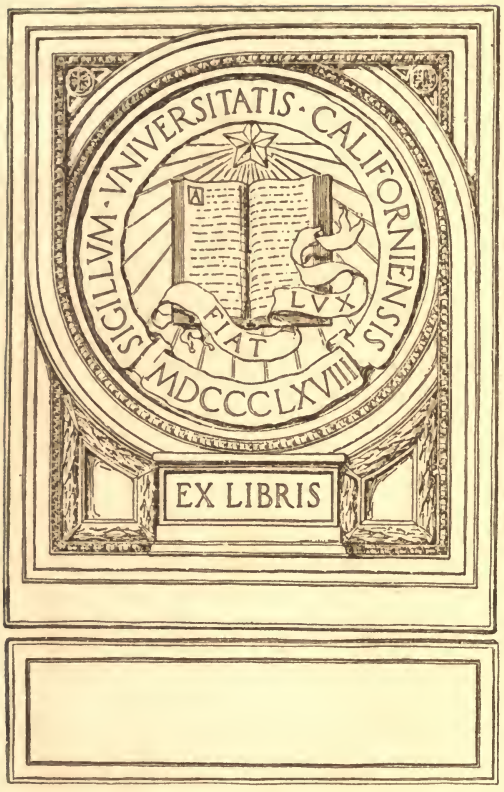
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# THE WRITINGS

OF

# JAMES MADISON

VOLUME VII.

1803–1807

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*February, 1908*

# THE WRITINGS

OF

# JAMES MADISON

COMPRISING HIS PUBLIC PAPERS AND HIS PRIVATE CORRESPONDENCE, INCLUDING NUMEROUS LETTERS AND DOCUMENTS NOW FOR THE FIRST TIME PRINTED

EDITED BY

GAILLARD HUNT

VOLUME VII.

1803–1807

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| | |
|---|---|
| 1803. | |
| January 18. | Instructs extraordinary mission to treat with France and Spain. |
| January 29. | Makes friendly overtures to England. |
| March 2. | Proposes plan for territorial cession from France to the United States. |
| April 18. | Discusses alliance with Great Britain against France. |
| July 14. | Receives treaty of cession of Louisiana. |
| December 20. | Formally receives Louisiana territory from France. |
| 1804. | |
| January 5. | Sends plan of proposed convention with Great Britain. |
| March 31. | Claims Louisiana extends east to River Perdido. |
| April 15. | Proposes convention of territorial cession with Spain. |
| July 20. | Instructs protest against British outrages. |
| 1805. | |
| April 12. | Argues for rights of trade of neutrals in time of war. |
| 1806. | |
| March 13. | Proposes convention with Spain. |
| May 17. | Forms extraordinary mission to England. |
| December. | Publishes examination into the British Doctrine with respect to neutral trade. |

1807.

May 20. States objections to Monroe treaty.

July 6. Orders protest for attack of the *Leopard* on the *Chesapeake*.

July 15. Announces probability of war.

December 23. Announces laying of an embargo on vessels.

UNIV. OF CALIFORNIA

# *THE WRITINGS OF JAMES MADISON.*

## TO CHARLES PINCKNEY.

D. OF S. MSS. INSTR.

DEPARTMENT OF STATE, Jany 10 1803.

SIR,

Since my letter of November 27th on the subject of what had taken place at New Orleans, a letter has been received from the Governor of Louisiana to Governor Claiborne, in which it is stated that the measure of the Intendant was without instructions from his Government, and admitted that his own judgment did not concur with that of the Intendant. You will find by the printed documents herewith transmitted that the subject engaged the early and earnest attention of the House of Representatives, and that all the information relating to it, possessed by the Executive, prior to the receipt of that letter, was reported in consequence of a call for it. The letter itself has been added to that report; but being confidentially communicated, it does not appear in print: a translation of it however is herewith inclosed. You will find also that the House has passed a resolution explicitly declaring that the stipulated rights of the United States on the Mississippi will be inviolably maintained. The disposition of many members was to give to the resolution a tone and complexion still stronger. To these proofs of the sensation which has been produced, it is to be added, that

representations, expressing the peculiar sensibility of the Western Country, are on the way from every quarter of it, to the Government. There is in fact but one sentiment throughout the union with respect to the duty of maintaining our rights of navigation and boundary. The only existing difference relates to the degree of patience which ought to be exercised during the appeal to friendly modes of redress. In this state of things it is to be presumed that the Spanish Government will accelerate by every possible means, its interposition for that purpose; and the President charges you to urge the necessity of so doing with as much amicable decision as you can employ. We are not without hopes, that the Intendant will yield to the demands which have been made on him, and to the advice which he will have received from the Spanish Minister here. But it will be expected from the justice and good faith of the Spanish Government, that its precise orders to that effect will be forwarded by the quickest conveyance possible. The President wishes also, that the expedient suggested in the letter above referred to, for preventing similar occurrences and delays, may also be duly pressed on that ground.

The deposition of George Lee, respecting the forgery of our Mediterranean passport, with copies of my last letters are inclosed.

The short notice given of the present opportunity leaves me time to add nothing more than assurances of the esteem and respect with which I remain, etc.

## TO CHARLES PINCKNEY.

D. OF S. MSS. INSTR.

DEPARTMENT OF STATE, January 18th 1803.

SIR,

My letters of Nov. 27th and Jany 10th communicated the information which had been received at those dates, relating to the violation at New Orleans of our Treaty with

Spain; together with what had then passed between the House of Representatives and the Executive on the subject. I now inclose a subsequent resolution of that branch of the Legislature. Such of the debates connected with it, as took place with open doors, will be seen in the Newspapers which it is expected will be forwarded by the Collector at New York, by the present opportunity. In these debates, as well as in indications from the press, you will perceive, as you would readily suppose, that the Cession of Louisiana to France has been associated as a ground of much solicitude, with the affair at New Orleans. Such indeed has been the impulse given to the public mind by these events, that every branch of the Government has felt the obligation of taking the measures most likely, not only to re-establish our present rights, but to promote arrangements by which they may be enlarged and more effectually secured. In deliberating on this subject, it has appeared to the President, that the importance of the crisis, called for the experiment of an Extraordinary Mission, carrying with it the weight attached to such a measure, as well as the advantage of a more thorough knowledge of the views of the Government and the sensibility of the public, than could be otherwise conveyed. He has accordingly selected for this service, with the approbation of the Senate Mr. Monroe formerly our Minister Plenipotentiary at Paris, and lastly Governor of the State of Virginia, who will be joined with Mr. Livingston in a Commission extraordinary to treat with the French Republic, and with yourself in a like Commission, to treat, if necessary with the Spanish Government. The President has been careful on this occasion to guard effectually against any possible misconstruction in relation to yourself by expressing in his message to the Senate, his undiminished confidence in the ordinary representation of the United States, and by referring the advantages of the additional mission to considerations perfectly consistent therewith.

Mr. Monroe will be the bearer of the instructions under which you are to negotiate. The object of them will be to

procure a Cession of New Orleans and the Floridas to the United States, and consequently the establishment of the Mississippi as the boundary between the United States and Louisiana. In order to draw the French Government into the measure, a sum of money will make part of our propositions, to which will be added, such regulations of the commerce of that river and of the others entering the Gulph of Mexico as ought to be satisfactory to France. From a letter received by the President from a respectable person, it is inferred with probability that the French Government is not averse to treat on those grounds, and such a disposition must be strengthened by the circumstances of the present moment.

Though it is probable that this Mission will be completed at Paris, if its objects are at all attainable, yet it was necessary to apprize you thus far of what is contemplated both for your own satisfaction and that you may be prepared to co-operate on the occasion as circumstances may demand. Mr. Monroe will not be able to sail for two weeks or perhaps more.

Of the letters to you on the infraction of our rights at New Orleans, several copies have already been forwarded. Another is now inclosed. It is of the deepest importance that the Spanish Government should have as early an opportunity as possible of correcting and redressing the injury. If it should refuse or delay to do so, the most serious consequences are to be apprehended. The Government and people of the United States, are friendly to Spain, and know the full value of peace; but they know their rights also, and will maintain them. The Spirit of the nation is faithfully expressed in the resolution of the House of Representatives above referred to. You will make the proper use of it with the Spanish Government in accelerating the necessary orders to its officer at New Orleans, or in ascertaining the part it means to take on the occasion.

The Convention with Spain is now before the Senate who have not come to a decision upon it. As soon as its fate is known I shall transmit you the necessary information.

TO ROBERT R. LIVINGSTON.

D. OF S. MSS. INSTR.

DEPARTMENT OF STATE, January 18th 1803

SIR,

My letters of December 23 and January 3 communicated the information which had been received of those dates, relating to the violation at New Orleans of our Treaty with Spain; together with what had then passed between the House of Representatives and the Executive on the subject. I now inclose a subsequent resolution of that branch of the Legislature. Such of the debates connected with it, as took place with open doors, will be seen in the newspapers which it is expected will be forwarded by the Collector at New York by the present opportunity. In these debates as well as in indications from the press, you will perceive, as you would readily suppose, that the Cession of Louisiana to France, has been associated as a ground of much solicitude, with the affair at New Orleans. Such indeed has been the impulse given to the public mind by these events that every branch of the Government has felt the obligation of taking the measures most likely, not only to re-establish our present rights, but to promote arrangements by which they may be enlarged and more effectually secured. In deliberating on this subject it has appeared to the President that the importance of the crisis, called for the experiment of an extraordinary mission carrying with it the weight attached to such a measure, as well as the advantage of a more thorough knowledge of the views of the Government and the sensibility of the people, than could be otherwise conveyed. He has accordingly selected for this service, with the approbation of the Senate, Mr. Monroe formerly our Minister Plenipotentiary at Paris, and lately Governor of the State of Virginia, who will be joined with yourself in a Commission extraordinary to treat with the French Republic and with Mr. Pinckney in a like Commission, to treat, if necessary, with the Spanish Government. The President has been careful on this occasion to guard effectu-

ally against any possible misconstruction in relation to yourself, by expressing in his message to the Senate, his undiminished confidence in the ordinary representation of the United States, and by referring the advantages of the additional Mission to considerations consistent therewith.

Mr. Monroe will be the bearer of the instructions under which you are jointly to negotiate. The object of them will be to procure a Cession of New Orleans and the Floridas to the United States, and consequently the establishment of the Mississippi as the boundary between the United States and Louisiana. In order to draw the French Government into the measure, a sum of money will make part of our propositions, to which will be added such regulations of the commerce of that river, and of the others entering the Gulph of Mexico, as ought to be satisfactory to France. From a letter received by the President from the respectable person alluded to in my last, it is inferred with probability, that the French Government is not averse to treat on those grounds. And such a disposition must be strengthened by the circumstances of the present moment.

I have thought it proper to communicate this much to you, without waiting for the departure of Mr. Monroe, who will not be able to sail for two weeks or perhaps more. I need not suggest to you, that in disclosing this diplomatic arrangement to the French Government and preparing the way for the object of it, the utmost care is to be used, in expressing extravagant anticipations of the terms to be offered by the United States; particularly of the sum of money to be thrown into the transaction. The ultimatum on this point will be settled before the departure of Mr. Monroe, and will be communicated by him. The sum hinted at in the letter to the President above referred to is ——————livres. If less will not do, we are prepared to meet it: but it is hoped that less will do, and that the prospect of accommodation will concur with other motives in postponing the expedition to Louisiana. For the present I barely remark that a proposition made to Congress with shut doors is under consideration which if

agreed to will authorize a payment of about ten Millions of livres under arrangements of time and place, that may be so convenient to the French Government, as to invite a prompt as well as a favorable decision in the case. The sum to which the proposition is limited, and which will probably not be effectually concealed, may at the same time assist in keeping the pecuniary expectations of the French cabinet.

Your letter of Nov. 10 with one from Mr. Sumter of ——— have been received. As no mention is made of the disastrous state of St. Domingo, we conclude that it was not then known at Paris; and ascribe to that ignorance the adherence to the plan of sending troops to take possession of Louisiana. If the French Government do not mean to abandon the reduction of that Island, it is certain that troops cannot be spared for the other object. The language held by Genl. Hector, as communicated to you, claims attention, and would be entitled to much more, if the imputation to the French Government, of views which would force an unnecessary war with the United States, could be reconciled with any motive whatever sufficient to account for such an infatuation.

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TO RUFUS KING. D. OF S. MSS. INSTR.

DEPARTMENT OF STATE, January 29th 1803.

SIR,

My letter of the 23d Ult, with a postscript of the 3d of this month, communicated the information which had been received at those dates relating to the violation at New Orleans of our Treaty with Spain; together with what had then passed between the House of Representatives and the Executive on the subject. I now inclose a subsequent resolution of that branch of the Legislature. Such of the debates connected with it, as took place with open doors, will be seen in the newspapers. In these debates, as well as in indications from the press, you will perceive, as you would readily suppose, that the Cession of Louisiana to France, has been asso-

ciated as a ground of much solicitude, with the affair at New Orleans. Such indeed has been the impulse given to the public mind by these events, that every branch of the Government has felt the obligation of taking the measures most likely not only to re-establish our present rights, but to promote arrangements by which they may be enlarged and more effectually secured. In deliberating on this subject, it has appeared to the President that the importance of the crisis, called for the experiment of an extraordinary mission; carrying with it the weight attached to such a measure, as well as the advantage of a more thorough knowledge of the views of the Government and of the sensibility of the public, than could be otherwise conveyed. He has accordingly selected for this service with the approbation of the Senate, Mr. Monroe, formerly our Minister Plenipotentiary at Paris, and lately Governor of the State of Virginia, who will be joined with Mr. Livingston in a Commission extraordinary to treat with the French Republic; and with the Spanish Government.

Mr. Monroe is expected here tomorrow, and he will probably sail shortly afterwards from New York.

These communications will enable you to meet the British Minister in conversation on the subject stated in your letter of May 7th 1802. The United States are disposed to live in amity with their neighbours whoever they may be, as long as their neighbours shall duly respect their rights, but it is equally their determination to maintain their rights against those who may not respect them; premising, where the occasion may require, the peaceable modes of obtaining satisfaction for wrongs, and endeavouring by friendly arrangements, and provident stipulations, to guard against the controversies most likely to occur.

Whatever may be the result of the present Mission Extraordinary, nothing certainly will be admitted into it, not consistent with our prior engagements. The United States and Great Britain have agreed each for itself to the free and common navigation by the other, of the River Mississippi; each

being left at the same time to a separate adjustment with other nations, of questions between them relative to the same subject. This being the necessary meaning of our Treaties with Great Britain, and the course pursued under them, a difference of opinion seems to be precluded. Any such difference would be matter of real regret; for it is not only our purpose to maintain the best faith with that nation, but our desire to cherish a mutual confidence and cordiality, which events may render highly important to both nations.

Your successor has not yet been named, and it is now possible that the time you may have fixed for leaving England, will arrive before any arrangements for the vacancy, can have their effect. Should this be the case the President, sensible of the inconveniency to which you might be subjected by an unexpected detention, thinks it would not be reasonable to claim it of you. It may be hoped that the endeavours to prevent an interval in the Legation will be successful; and as it cannot be more than a very short one, no great evil can well happen from it.

## TO ROBERT R. LIVINGSTON AND JAMES MONROE.

D. OF S. MSS. INSTR.

DEPARTMENT OF STATE, March 2d, 1803

GENTLEMEN,

You will herewith receive a Commission and letters of credence, one of you as Minister Plenipotentiary, the other as Minister Extraordinary and Plenipotentiary, to treat with the Government of the French Republic, on the subject of the Mississippi and the Territory eastward thereof, and without the limits of the United States. The object in view is to procure by just and satisfactory arrangements a cession to the United States of New Orleans, and of West and East Florida, or as much thereof as the actual proprietor can be prevailed on to part with.

The French Republic is understood to have become the

proprietor by a cession from Spain in the year of New Orleans, as part of Louisiana, if not of the Floridas also. If the Floridas should not have been then included in the Cession, it is not improbable that they will have been since added to it.

It is foreseen that you may have considerable difficulty in overcoming the repugnance and the prejudices of the French Government against a transfer to the United States of so important a part of the acquisition. The apparent solicitude and exertions amidst many embarrassing circumstances, to carry into effect the cession made to the French Republic, the reserve so long used on this subject by the French Government in its communications with the Minister of the United States at Paris, and the declaration finally made by the French Minister of Foreign relations, that it was meant to take possession before any overtures from the United States would be discussed, shew the importance which is attached to the territories in question. On the other hand as the United States have the strongest motives of interest and of a pacific policy to seek by just means the establishment of the Mississippi, down to its mouth as their boundary, so these are considerations which urge on France a concurrence in so natural and so convenient an arrangement.

Notwithstanding the circumstances which have been thought to indicate in the French Government designs of unjust encroachment, and even direct hostility on the United States, it is scarcely possible, to reconcile a policy of that sort, with any motives which can be presumed to sway either the Government or the Nation. To say nothing of the assurances given both by the French Minister at Paris, and by the Spanish Minister at Madrid, that the cession by Spain to France was understood to carry with it all the conditions stipulated by the former to the United States, the manifest tendency of hostile measures against the United States, to connect their Councils, and their Colosal growth with the great and formidable rival of France, can never escape her discernment, nor be disregarded by her prudence, and might

alone be expected to produce very different views in her Government.

On the supposition that the French Government does not mean to force, or Court war with the United States; but on the contrary that it sees the interest which France has in cultivating their neutrality and amity, the dangers to so desirable a relation between the two countries which lurk under a neighbourhood modified as is that of Spain at present, must have great weight in recommending the change which you will have to propose. These dangers have been always sufficiently evident; and have moreover been repeatedly suggested by collisions between the stipulated rights or reasonable expectations of the United States, and the Spanish jurisdiction at New Orleans. But they have been brought more strikingly into view by the late proceeding of the Intendant at that place. The sensibility and unanimity in our nation which have appeared on this occasion, must convince France that friendship and peace with us must be precarious until the Mississippi shall be made the boundary between the United States and Louisiana; and consequently render the present moment favorable to the object with which you [are] charged.

The time chosen for the experiment is pointed out also by other important considerations. The instability of the peace of Europe, the attitude taken by Great Britain, the languishing state of the French finances, and the absolute necessity of either abandoning the West India Islands or of sending thither large armaments at great expence, all contribute at the present crisis to prepare in the French Government a disposition to listen to an arrangement which will at once dry up one source of foreign controversy, and furnish some aid in struggling with internal embarrassments. It is to be added, that the overtures committed to you coincide in great measure with the ideas of the person thro' whom the letter of the President of April 30–1802 was conveyed to Mr. Livingston, and who is presumed to have gained some insight into the present sentiments of the French Cabinet.

Among the considerations which have led the French Government into the project of regaining from Spain the province of Louisiana, and which you may find it necessary to meet in your discussions, the following suggest themselves as highly probable.

1st A jealousy of the Minister as leaning to a coalition with Great Britain and consistent with neutrality and amity towards France; and a belief that by holding the key to the commerce of the Mississippi, she will be able to command the interests and attachments of the Western portion of the United States; and thereby either controul the Atlantic portion also, or if that cannot be done, to seduce the former with a separate Government, and a close alliance with herself.

In each of these particulars the calculation is founded in error.

It is not true that the Atlantic states lean towards any connection with Great Britain inconsistent with their amicable relations to France. Their dispositions and their interests equally prescribe to them amity and impartiality to both of those nations. If a departure from this simple and salutary line of policy should take place, the causes of it will be found in the unjust or unfriendly conduct experienced from one or other of them. In general it may be remarked, that there are as many points on which the interests and views of the United States and of Great Britain may not be thought to coincide as can be discovered in relation to France. If less harmony and confidence should therefore prevail between France and the United States than may be maintained between Great Britain and the United States, the difference will be not in the want of motives drawn from the mutual advantage of the two nations; but in the want of favorable dispositions in the Governments of one or the other of them. That the blame in this respect will not justly fall on the Government of the United States, is sufficiently demonstrated by the Mission and the objects with which you are now charged.

The French Government is not less mistaken if it supposes that the Western part of the United States can be withdrawn

from their present Union with the Atlantic part, into a separate Government closely allied with France.

Our Western fellow citizens are bound to the Union not only by the ties of kindred and affection which for a long time will derive strength from the stream of emigration peopling that region, but by two considerations which flow from clear and essential interests.

One of these considerations is the passage thro' the Atlantic ports of the foreign merchandize consumed by the Western inhabitants, and the payments thence made to a Treasury in which they would lose their participation by erecting a separate Government. The bulky productions of the Western Country may continue to pass down the Mississippi; but the difficulties of the ascending navigation of that river, however free it may be made, will cause the imports for consumption to pass thro' the Atlantic States. This is the course thro' which they are now received, nor will the impost to which they will be subject change the course even if the passage up the Mississippi should be duty free. It will not equal the difference in the freight thro' the latter channel. It is true that mechanical and other improvements in the navigation of the Mississippi may lessen the labour and expence of ascending the stream, but it is not the least probable, that savings of this sort will keep pace with the improvements in canals and roads, by which the present course of imports will be favored. Let it be added that the loss of the contributions thus made to a foreign Treasury would be accompanied with the necessity of providing by less convenient revenues for the expence of a separate Government, and of the defensive precautions required by the change of situation.

The other of these considerations results from the insecurity to which the trade from the Mississippi would be exposed, by such a revolution in the Western part of the United States. A connection of the Western people as a separate state with France, implies a connection between the Atlantic States and Great Britain. It is found from long experience that France and Great Britain are nearly half their time at

War. The case would be the same with their allies. During nearly one half the time therefore, the trade of the Western Country from the Mississippi, would have no protection but that of France, and would suffer all the interruptions which nations having the command of the sea could inflict on it.

It will be the more impossible for France to draw the Western Country under her influence, by conciliatory regulations of the trade thro' the Mississippi, because regulations which would be regarded by her as liberal and claiming returns of gratitude, would be viewed on the other side as falling short of justice. If this should not be at first the case, it soon would be so. The Western people believe, as do their Atlantic brethren, that they have a natural and indefeasible right to trade freely thro' the Mississippi. They are conscious of their power to enforce their right against any nation whatever. With these ideas in their minds, it is evident that France will not be able to excite either a sense of favor, or of fear, that would establish an ascendency over them. On the contrary, it is more than probable, that the different views of their respective rights, would quickly lead to disappointments and disgusts on both sides, and thence to collisions and controversies fatal to the harmony of the two nations. To guard against these consequences, is a primary motive with the United States, in wishing the arrangement proposed. As France has equal reasons to guard against them, she ought to feel an equal motive to concur in the arrangement.

2d. The advancement of the commerce of France by an establishment on the Mississippi, has doubtless great weight with the Government in espousing this project.

The commerce thro' the Mississippi will consist 1st of that of the United States, 2d of that of the adjacent territories to be acquired by France.

The 1st is now and must for ages continue the principal commerce. As far as the faculties of France will enable her to share in it, the article to be proposed to her on the part of the United States on that subject promises every advantage she can desire. It is a fair calculation, that under the proposed

arrangement, her commercial opportunities would be extended rather than diminished; inasmuch as our present right of deposit gives her the same competitors as she would then have, and the effect of the more rapid settlement of the Western Country consequent on that arrangement would proportionally augment the mass of commerce to be shared by her.

The other portion of commerce, with the exception of the Island of New Orleans and the contiguous ports of West Florida, depends on the Territory Westward of the Mississippi. With respect to this portion, it will be little affected by the Cession desired by the United States. The footing proposed for her commerce on the shore to be ceded, gives it every advantage she could reasonably wish, during a period within which she will be able to provide every requisite establishment on the right shore; which according to the best information, possesses the same facilities for such establishments as are found on the Island of New Orleans itself. These circumstances essentially distinguish the situation of the French commerce in the Mississippi after a Cession of New Orleans to the United States, from the situation of the commerce of the United States, without such a Cession; their right of deposit being so much more circumscribed and their territory on the Mississippi not reaching low enough for a commercial establishment on the shore, within their present limits.

There remains to be considered the commerce of the Ports in the Floridas. With respect to this branch, the advantages which will be secured to France by the proposed arrangement ought to be satisfactory. She will here also derive a greater share from the increase, which will be given by a more rapid settlement of a fertile territory, to the exports and imports thro' those ports, than she would obtain from any restrictive use she could make of those ports as her own property. But this is not all. The United States have a just claim to the use of the rivers which pass from their territories thro' the Floridas. They found their claim on like principles with those which supported their claim to the use

of the Mississippi. If the length of these rivers be not in the same proportion with that of the Mississippi, the difference is balanced by the circumstance that both Banks in the former case belong to the United States.

With a view to perfect harmony between the two nations a cession of the Floridas is particularly to be desired, as obviating serious controversies that might otherwise grow even out of the regulations however liberal in the opinion of France, which she may establish at the Mouth of those rivers. One of the rivers, the Mobile, is said to be at present navigable for 400 miles above the 31° of latitude, and the navigation may no doubt be opened still further. On all of them, the Country within the Boundary of the United States, tho' otherwise between that and the sea, is fertile. Settlements on it are beginning; and the people have already called on the Government to procure the proper outlets to foreign Markets. The President accordingly, gave some time ago, the proper instructions to the Minister of the United States at Madrid. In fact, our free communication with the sea thro' these channels is so natural, so reasonable, and so essential that eventually it must take place, and in prudence therefore ought to be amicably and effectually adjusted without delay.

A further object with France may be, to form a Colonial establishment having a convenient relation to her West India Islands, and forming an independent source of supplies for them.

This object ought to weigh but little against the Cession we wish to obtain for two reasons, 1st. Because the Country which the Cession will leave in her hands on the right side of the Mississippi is capable of employing more than all the faculties she can spare for such an object and of yielding all the supplies which she could expect, or wish from such an establishment: 2d Because in times of general peace, she will be sure of receiving whatever supplies her Islands may want from the United States, and even thro' the Mississippi if more convenient to her; because in time of peace with the United States, tho' of War with Great Britain, the same sources will

be open to her, whilst her own would be interrupted; and because in case of war with the United States, which is not likely to happen without a concurrent war with Great Britain (the only case in which she could need a distinct fund of supplies) the entire command of the sea, and of the trade thro' the Mississippi, would be against her, and would cut off the source in question. She would consequently never need the aid of her new Colony, but when she could make little or no use of it.

There may be other objects with France in the projected acquisition; but they are probably such as would be either satisfied by a reservation to herself of the Country on the right side of the Mississippi, or are of too subordinate a character to prevail against the plan of adjustment we have in view; in case other difficulties in the way of it can be overcome. The principles and outlines of this plan are as follows viz.

Ist

France cedes to the United States forever, the Territory East of the River Mississippi, comprehending the two Floridas, the Island of New Orleans and the Island lying to the North and East of that channel of the said River, which is commonly called the Mississippi, together with all such other Islands as appertain to either West or East Florida; France reserving to herself all her territory on the West side of the Mississippi.

II.

The boundary between the Territories ceded and reserved by France shall be a continuation of that already defined above the 31st degree of North Latitude viz, the middle of the channel or bed of the river, thro' the said South pass to the sea. The navigation of the river Mississippi in its whole breadth from its source to the ocean, and in all its passages to and from the same shall be equally free and common to citizens of the United States and of the French Republic.

III

The vessels and citizens of the French Republic may exercise commerce to and at such places on their respective shores below the said thirty first degree of North Latitude as may be allowed for that use by the parties to their respective citizens and vessels. And it is agreed that no other Nation shall be allowed to exercise commerce to or at the same or any other place on either shore, below the said thirty first degree of Latitude. For the term of ten years to be computed from the exchange of the ratifications hereof, the citizens, vessels and merchandizes of the United States and of France shall be subject to no other duties on their respective shores below the said thirty first degree of latitude than are imposed on their own citizens, vessels and merchandizes. No duty whatever shall, after the expiration of ten years be laid on Articles the growth or manufacture of the United States or of the ceded Territory exported thro' the Mississippi in French vessels, so long as such articles so exported in vessels of the United States shall be exempt from duty; nor shall French vessels exporting such articles, ever afterwards be subject to pay a higher duty than vessels of the United States.

IV.

The citizens of France may, for the term of ten years, deposit their effects at New Orleans and at such other places on the ceded shore of the Mississippi, as are allowed for the commerce of the United States, without paying any other duty than a fair price for the hire of stores.

V.

In the ports and commerce of West and East Florida, France shall never be on a worse footing than the most favored nations; and for the term of ten years her vessels and merchandize shall be subject therein to no higher duties than are paid by those of the United States and of the ceded Terri-

tory, exported in French vessels from any port in West or East Florida, [and] shall be exempt from duty as long as vessels of the United States shall enjoy this exemption.

VI.

The United States, in consideration of the Cession of Territory made by this Treaty shall pay to France ———— millions of livres Tournois, in the manner following, viz, They shall pay ———— millions of livres tournois immediately on the exchange of the ratifications hereof: they shall assume in such order of priority as the Government of the United States may approve, the payment of claims, which have been or may be acknowledged by the French Republic to be due to American citizens, or so much thereof as with the payment to be made on the exchange of ratifications will not exceed the sum of ———— and in case a balance should remain due after such payment and assumption, the same shall be paid at the end of one year from the final liquidation of the claims hereby assumed, which shall be payable in three equal annual payments, the first of which is to take place one year after the exchange of ratifications or they shall bear interest at the rate of six p Cent p annum from the date of such intended payments; until they shall be discharged. All the above mentioned payments shall be made at the Treasury of the United States and at the rate of one dollar and ten cents for every six livres tournois.

VII.

To incorporate the inhabitants of the hereby ceded territory with the citizens of the United States on an equal footing, being a provision, which cannot now be made, it is to be expected, from the character and policy of the United States, that such incorporation will take place without unnecessary delay. In the meantime they shall be secure in their persons and property, and in the free enjoyment of their religion.

OBSERVATIONS ON THE PLAN.

1st As the Cession to be made by France in this case must rest on the Cession made to her by Spain, it might be proper that Spain should be a party to the transaction. The objections however to delay require that nothing more be asked on our part, than either an exhibition and recital of the Treaty between France and Spain; or an engagement on the part of France, that the accession of Spain will be given. Nor will it be advisable to insist even on this much, if attended with difficulty or delay, unless there be ground to suppose that Spain will contest the validity of the transaction.

2d The plan takes for granted also that the Treaty of 1795 between the United States and Spain is to lose none of its force in behalf of the former by any transactions whatever between the latter and France. No change it is evident will be, or can be admitted to be produced in that Treaty or in the arrangements carried into effect under it, further than it may be superseded by stipulations between the United States and France, who will stand in the place of Spain. It will not be amiss to insist on an express recognition of this by France as an effectual bar against pretexts of any sort not compatible with the stipulations of Spain.

3d The first of the articles proposed, in defining the Cession refers to the South pass of the Mississippi, and to the Islands North and East of that channel. As this is the most navigable of the several channels, as well as the most direct course to the sea, it is expected that it will not be objected to. It is of the greater importance to make it the boundary, because several Islands will be thereby acquired, one of which is said to command this channel, and to be already fortified. The article expressly included also the Islands appertaining to the Floridas. To this there can be no objection. The Islands within six leagues of the shore are the subject of a British proclamation in the year 1763 subsequent to the Cession of the Floridas to Great Britain by France, which is

not known to have been ever called in question by either France or Spain.

The 2d Article requires no particular observations.

Article 3d is one whose import may be expected to undergo the severest scrutiny. The modification to be desired is that, which, whilst it provides for the interest of the United States will be acceptable to France, and will give no just ground of complaint, and the least of discontent to Great Britain.

The present form of the article ought and probably will be satisfactory to France; first because it secures to her all the commercial advantages on the river which she can well desire; secondly because it leaves her free to contest the mere navigation of the River by Great Britain, without the consent of France.

The article also, in its present form violates no right of Great Britain, nor can she reasonably expect of the United States that they will contend beyond their obligations for her interest at the expense of their own. As far as Great Britain can claim the use of the river under her Treaties with us, or by virtue of, contiguous territory, the silence of the Article on that subject, leaves the claim unaffected. As far again as she is entitled under the Treaty of 1794 to the use of our Bank of the Mississippi above the 31st degree of N. Latitude, her title will be equally entire. The article stipulates against her only in its exclusion of her commerce from the bank to be ceded below our present limits. To this she cannot, of right object, 1st because the Territory not belonging to the United States at the date of our Treaty with her is not included in its stipulations, 2dly because the privileges to be enjoyed by France are for a consideration which Great Britain has not Given and cannot give 3dly because the conclusion in this case, being a condition on which the Territory will be ceded and accepted, the right to communicate the privilege to Great Britain will never have been vested in the United States.

But altho' these reasons fully justify the article in its relation to Great Britain, it will be advisable before it be proposed, to feel the Pulse of the French Government with

respect to a stipulation that each of the parties may without the consent of the other admit whomsoever it pleases to navigate the river and trade with their respective shores, on the same terms, as in other parts of France and theUnited States; and as far as the disposition of that Government will concur, to vary the proposition accordingly. It is not probable that this concurrence will be given; but the trial to obtain it will not only manifest a friendly regard to the wishes of Great Britain, and if successful, furnish a future price for privileges within her grant; but is a just attention to the interests of our Western fellow citizens, whose commerce will not otherwise be on an equal footing with that of the Atlantic States.

Should France not only refuse any such change in the Article; but insist on a recognition of her right to exclude all nations, other than the United States, from navigating the Mississippi, it may be observed to her, that a positive stipulation to that effect might subject us to the charge of intermeddling with and prejudging questions existing merely between her and Great Britain; that the silence of the article is sufficient ; that as Great Britain never asserted a claim on this subject against Spain, it is not to be presumed that she will assert it against France on her taking the place of Spain; that if the claim should be asserted the Treaties between the United States and Great Britain will have no connection with it, the United States having in those treaties given their separate consent only to the use of the river by Great Britain, leaving her to seek whatever other consent may be necessary.

If, notwithstanding such expostulations as these, France shall inflexibly insist on an express recognition to the above effect it will be better to acquiesce in it, than to lose the opportunity of fixing an arrangement, in other respects satisfactory; taking care to put the recognition into a form not inconsistent with our treaties with Great Britain, or with an explanatory article that may not improbably be desired by her.

In truth it must be admitted, that France as holding one bank, may exclude from the use of the river any Nation

not more connected with it by Territory than Great Britain is understood to be. As a river where both its banks are owned by one Nation, belongs exclusively to that Nation; it is clear that when the Territory on one side is owned by one Nation and on the other side by another nation, the river belongs equally to both, in exclusion of all others. There are two modes by which an equal right may be exercised; the one by a negative in each on the use of the river by any other nation except the joint proprietor, the other by allowing each to grant the use of the river to other nations, without the consent of the joint proprietor. The latter mode would be preferable to the United States. But if it be found absolutely inadmissible to France, the former must in point of expediency, since it may in point of right be admitted by the United States. Great Britain will have the less reason to be dissatisfied on this account as she has never asserted against Spain, a right of entering and navigating the Mississippi, nor has she or the United States ever founded on the Treaties between them, a claim to the interposition of the other party in any respect; altho' the river has been constantly shut against Great Britain from the year 1783 to the present moment, and was not opened to the United States until 1795, the year of their Treaty with Spain.

It is possible also that France may refuse to the United States, the same commercial use of her shores, as she will require for herself on those ceded to the United States. In this case it will be better to relinquish a reciprocity, than to frustrate the negotiation. If the United States held in their own right, the shore to be ceded to them, the commercial use of it allowed to France, would render a reciprocal use of her shore by the United States, an indispensable condition. But as France may, if she chuses, reserve to herself the commercial use of the ceded shore as a condition of the cession, the claim of the United States to the like use of her shore would not be supported by the principle of reciprocity, and may therefore without violating that principle, be waved in the transaction.

The article limits to ten years the equality of French citizens, vessels and merchandizes, with those of the United States. Should a longer period be insisted on it may be yielded. The limitation may even be struck out, if made essential by France; but a limitation in this case is so desirable that it is to be particularly pressed, and the shorter the period the better.

Art IV The right of deposit provided for in this article, will accommodate the commerce of France, to and from her own side of the river, until an emporium shall be established on that side, which it is well known will admit of a convenient one. The right is limited to ten years, because such an establishment may within that period be formed by her. Should a longer period be required, it may be allowed, especially as the use of such a deposit would probably fall within the general regulations of our commerce there. At the same time, as it will be better that it should rest on our own regulations, than on a stipulation, it will be proper to insert a limitation of time, if France can be induced to acquiesce in it.

Art. V. This article makes a reasonable provision for the commerce of France in the ports of West and East Florida. If the limitation to ten years of its being on the same footing with that of the United States, should form an insuperable objection, the term may be enlarged; but it is much to be wished that the privilege may not in this case, be made perpetual.

Art VI—The pecuniary consideration, to be offered for the territories in question, is stated in Art. VI. You will of course favor the United States as much as possible both in the amount and the modifications of the payments. There is some reason to believe that the gross sum expressed in the Article, has occurred to the French Government, and is as much as will be finally insisted on. It is possible that less may be accepted, and the negotiation ought to be adapted to that supposition. Should a greater sum be made an ultimatum on the part of France, the President has made up

his mind to go as far as fifty —— million of livres tournois, rather than lose the main object. Every struggle however is to be made against such an augmentation of the price, that will consist with an ultimate acquiescence in it.

The payment to be made immediately on the exchange of ratifications is left blank; because it cannot be foreseen either what the gross sum or the assumed debts will be; or how far a reduction of the gross sum may be influenced by the anticipated payments provided for by the act of Congress herewith communicated and by the authorization of the President and Secretary of the Treasury endorsed thereon. This provision has been made with a view to enable you to take advantage of the urgency of the French Government for money, which may be such as to overcome their repugnance to part with what we want, and to induce them to part with it on lower terms, in case a payment can be made before the exchange of ratifications. The letter from the Secretary of the Treasury to the Secretary of State, of which a copy is herewith inclosed, will explain the manner in which this advance of the ten Millions of livres, or so much thereof as may be necessary, will be raised most conveniently for the United States. It only remains here to point out the condition or event on which the advance may be made. It will be essential that the Convention be ratified by the French Government before any such advance be made; and it may be further required, in addition to the stipulation to transfer possession of the ceded territory as soon as possible, that the orders for the purpose, from the competent source, be actually and immediately put into your hands. It will be proper also to provide for the payment of the advance, in the event of a refusal of the United States to ratify the Convention.

It is apprehended that the French Government will feel no repugnance to our designating the classes of claims and debts, which, embracing more equitable considerations than the rest, we may believe entitled to a priority of payment. It is probable therefore that the clause of the VI article referring it to our discretion may be safely insisted upon. We think

the following classification such as ought to be adopted by ourselves.

1st. Claims under the fourth Article of the Convention of Sept. 1800.

2ndly Forced contracts or sales imposed upon our citizens by French authorities; and

3rdly Voluntary contracts, which have been suffered to remain unfulfilled by them.

Where our citizens have become creditors of the French Government in consequence of Agencies or Appointments derived from it, the United States are under no particular obligation to patronize their claims, and therefore no sacrifice of any sort, in their behalf ought to be made in the arrangement. As far as this class of claimants can be embraced, with [out] embarrassing the negotiation, or influencing in any respect the demands or expectations of the French Government, it will not be improper to admit them into the provision. It is not probable however, that such a deduction from the sum ultimately to be received by the French Government will be permitted, without some equivalent accommodation to its interests, at the expence of the United States.

The claims of Mr. Beaumarchais and several other French individuals on our government, founded upon antiquated or irrelevant grounds, altho' they may be attempted to be included in this negotiation have no connection with it. The American Government is distinguished for its just regard to the rights of foreigners and does not require those of individuals to become subjects of Treaty in order to be admitted. Besides, their discussion involves a variety of minute topics, with which you may fairly declare yourselves to be unacquainted. Should it appear however, in the course of the negotiation, that so much stress is laid on this point, that without some accommodation, your success will be endangered, it will be allowable to bind the United States for the payment of one Million of livres tournois to the representatives of Beaumarchais, heretofore deducted from his account against them; the French Government declaring the same

never to have been advanced to him on account of the United States.

Art. VII is suggested by the respect due to the rights of the people inhabiting the ceded territory and by the delay which may be found in constituting them a regular and integral portion of the Union. A full respect for their rights might require their consent to the Act of Cession; and if the French Government should be disposed to concur in any proper mode of obtaining it, the provision would be honorable to both nations. There is no doubt that the inhabitants would readily agree to the proposed transfer of their allegiance.

It is hoped that the idea of a guarantee of the Country reserved to France may not be brought into the negotiation. Should France propose such a stipulation it will be expedient to evade it if possible, as more likely to be a source of disagreeable questions, between the parties concerning the actual casus federis than of real advantage to France. It is not in the least probable that Louisiana in the hands of that Nation will be attacked by any other whilst it is in the relations to the United States on which the guarantee would be founded; whereas nothing is more probable than some difference of opinion as to the circumstances and the degree of danger necessary to put the stipulations in force. There will be less reason in the demand of such an Article as the United States would [put] little value on a guarantee of any part of their territory and consequently there would be no great reciprocity in it. Should France notwithstanding these considerations make a guarantee an essential point, it will be better to accede to it than to abandon the object of the negotiation, mitigating the evil as much as possible by requiring for the casus federis a great and manifest danger threatened to the Territory guaranteed, and by substituting for an indefinite succour, or even a definite succour in Military force, a fixed sum of money payable at the Treasury of the United States. It is difficult to name the proper sum which is in no posture of the business to be exceeded, but it can scarcely be presumed that more

than about ———— dollars, to be paid annually during the existence of the danger, will be insisted on. Should it be unavoidable to stipulate troops in place of money, it will be prudent to settle the details with as much precision as possible, that there may be no room for controversy either with France or with her money, on the fulfillment of the stipulation.

The instructions thus far given suppose that France may be willing to cede to the United States the whole of the Island of New Orleans, and both the Floridas. As she may be inclined to dispose of a part or parts, and of such only, it is proper for you to know that the Floridas together are estimated at ¼ the value of the whole Island of New Orleans, and East Florida at ½ that of West Florida. In case of a partial Cession, it is expected, that the regulations of every other kind so far as they are onerous to the United States, will be more favorably modified.

Should France refuse to cede the whole of the Island, as large a portion as she can be prevailed on to part with, may be accepted; should no considerable portion of it be attainable, it will still be of vast importance to get a jurisdiction over space enough for a large commercial town and its appurtenances, on the Bank of the river, and as little remote from the mouth of the river as may be. A right to chuse the place, would be better than a designation of it in the Treaty. Should it be impossible to procure a complete jurisdiction over any convenient spot whatever, it will only remain to explain and improve the present right of deposit, by adding thereto the express privilege of holding real estate for commercial purposes, of providing hospitals, of having Consuls residing there, and other Agents who may be authorized to authenticate and deliver all documents requisite for vessels belonging to and engaged in the trade of the United States to and from the place of deposit. The United States cannot remain satisfied, nor the Western people be kept patient under the restrictions which the existing Treaty with Spain authorizes.

Should a Cession of the Floridas not be attainable your

attention will also be due to the establishment of suitable deposits at the mouths of the rivers passing from the United States thro' the Floridas, as well as of the Free navigation of the rivers by Citizens of the United States. What has been above suggested in relation to the Mississippi and the deposit on its Banks is applicable to the other rivers; and additional hints relative to them all may be derived from the letter of which a copy is inclosed from the Consul at New Orleans.

It has been long manifest, that whilst the injuries to the United States so frequently occurring from the Colonial offices scattered over our hemisphere and in our neighbourhood can only be repaired by a resort to their respective Governments in Europe, that it will be impossible to guard against the most serious inconveniences. The late events at New Orleans strongly manifest the necessity of placing a power somewhere nearer to us, capable of correcting and controuling the mischievous proceedings of such officers toward our citizens, without which a few individuals not always among the wisest and best of men, may at any time threaten the good understanding of the two Nations. The distance between the United States and the old continent, and the mortifying delays of explanations and negotiations across the Atlantic on emergencies in our neighborhood, render such a provision indispensable, and it cannot be long before all the Governments of Europe having American Colonies must see the necessity of making it. This object therefore will likewise claim your special attention.

It only remains to suggest that considering the possibility of some intermediate violence between citizens of the United States and the French or Spaniards in consequence of the interruption of our right of deposit, and the probability that considerable damages will have been occasioned by that measure to citizens of the United States, it will be proper that indemnification in the latter case be provided for, and that in the former, it shall not be taken on either side as a ground or pretext for hostilities.

These instructions, tho' as full as they could be conven-

iently made, will necessarily leave much to your discretion. For the proper exercise of it, the President relies on your information, your judgment, and your fidelity to the interests of your Country.

TO JAMES MONROE. D. OF S. MSS. INSTR.
DEPARTMENT OF STATE, March 2d, 1803.[1]

SIR,

You will herewith receive two Commissions with the correspondent instructions, in which, you are associated as Minister Plenipotentiary and Extraordinary to the French

[1] TO JAMES MONROE.

WASHINGTON, Mar. 1, 1803.

DEAR SIR,—Since you left us we have no further intelligence from N. Orleans, except a letter dated Jan$^{y}$ 20 from the vice Consular agent there, from which it appears that the letters to the Gov$^{r}$. & Intendant from the Spanish Minister here, had arrived ab$^{t}$. the 13$^{th}$, and had not on the 20$^{th}$, produced the desired change in the state of things. The delay however does not seem to have been viewed by the Consul as any proof, that the Intendant would not conform to the interposition. The idea continued that he had taken measures without orders from his Gov$^{t}$. There are letters (according to that from the Consul) for the Marquis Yrujo now on the way by land. These will probably shew whether the Intendant will yield or not. The despatch vessel which carried the Marquis's letters is not yet returned. The detention of her beyond the allotted time is favorably interpreted by him ; on the presumption that she waits for a satisfactory answer, which the pride of the Intendant postpones as long as possible.

The Newspapers will have informed you of the turn given to the proceedings of Cong$^{s}$. on the subject of N. Orleans, &c. The proposition of M$^{r}$. Ross in the Senate which drove at war thro' a delegation of unconstitutional power to the Executive were discussed very elaborately, and *with open doors*. The adversaries of them triumphed in the debate, and threw them out by 15 votes ag$^{st}$ 11. On the motion of M$^{r}$. Breckenridge measures of expenseless or cheap preparation in the stile of those which attended M$^{r}$. Jay's mission to G. Britain, have been agreed on in the Senate. It is uncertain whether even these will pass the House of Rep$^{s}$. If they should as is perhaps not improper, they will not be understood as indicating no views that ought to excite suspicions or unfriendly sensations in either of the Gov$^{t}$. to which your Mission is

Republic and to His Catholic Majesty, together with the respective letters of credence to those Governments.

The allowance for the service will be a salary at the rate of nine thousand dollars a year. The general rule which dates the commencement of the salary at the time of leaving home being inapplicable to your case, inasmuch as your appointment was notified and accepted at this place; your salary will commence on the ——— day of January on which it was understood you accepted the appointment; and will cease with the termination of the business of your Mission; a quarter's salary being however added, as an allowance for the expences of your return home.

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addressed. The truth is that justice & peace prevail not only in the Public Councils; but in the body of the Community; and will continue to do so as long as the conduct of other nations will permit. But France & Spain cannot be too deeply impressed with the necessity of revising their relations to us thro' the Misspi, if they wish to enjoy our friendship, or preclude a state of things which will be more formidable than any that either of those powers has yet experienced. Some adjustments such as those which you have to propose have become indispensable. The whole of what we wish is not too much to secure permanent harmony between the parties. Something much better than has hitherto been enjoyed by the States, is essential to any tolerable degree of it even for the present.

I enclose you an extract of a letter from Mr. Gallatin, which could not be well incorporated with the instructions. The information it gives may nevertheless be of use, & I take this mode of putting it in your hands.

I understand that a bill is likely to pass granting Gen[l] Fayette 12,000 acres of land, as due for military services. We are anxious that a clause may be inserted authorizing the President to locate the tract wherever he pleases. Should this idea succeed, the grant may become of great value, perhaps beyond the contemplation of the Marquis or his most sanguine friends. Without such a clause, the land may be of little account, and will probably fall short of the lowest expectations.

In the instructions relative to Art VI, you will find an important discretion given on the subject of Beaumarchais claim. It was suggested by the possibility that the claim may be pressed with an energy beyond its importance in any public view; Such a discretion was therefore highly expedient, and may possibly be used with desirable effect.

You will receive herewith sundry printed papers, & I recommend

The distinction between the circumstances of an extraordinary and temporary mission and those of a mission requiring a fixed establishment, is the ground on which no outfit is allowed. But you will be allowed your expences in repairing to Paris, including those of a Journey from your home to this place; and your expences in travelling between the places where you are or may be required to attend. In adopting this mode of allowance in lieu of the outfit, the President presuming your expences will not exceed a year's salary, has thought proper to make that the limit. In addition to the above, you will have a right to charge for postages and Couriers, should the latter prove necessary.

Your Mission to Madrid will depend on the event of that to Paris, and on the information there to be acquired. Should the entire Cession in view be obtained from the French Republic as the assignees of Spain, it will not be necessary to

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that you receive from M^r. Gilston whatever Newspapers he may have on hand for M^r. Livingston.

I have not heard from you since yours of the 22^d. If I should find on the rec^t. of your next that I have time eno', you shall hear again from me before your departure; but it will probably be on private subjects only.

M^rs Madison offers with me affectionate respects, an agreeable voyage, and happy scenes to M^rs Monroe & Miss Eliza, as well as to yourself.

Adieu

P. S. Your instructions &c &c will be put into the mail tomorrow evening. Some unavoidable delays have prevented their going by the present.

(*Extract of a letter from Albert Gallatin, Esq^r., to J. Madison, Esq^r.*)

Dated Feby 7, 1803.

If West Florida can alone be purchased, it is certainly worth attending to; but in that case, making the river Iberville the boundary as it was made in the treaty of 1762 between France and England, the article should be so worded as to give us the whole channel of that river, or at least to permit us to open it so as to render it navigable in all seasons. At present the bed is 30 feet above low water mark for 15 miles from the Mississippi to Amit river; but I have no doubt that a very small opening would be widened & deepened afterwards by the river.

resort to the Spanish Government. Should the whole or any part of the Cession be found to depend, not on the French, but on the Spanish Government you will proceed to join Mr. Pinckney in the requisite negotiations with the latter. Altho' the United States are deeply interested in the complete success of your Mission, the Floridas, or even either of them, without the Island of New Orleans, on proportionate terms, will be a valuable acquisition.

The President will expect, that the most punctual and exact communication be made, of the progress and prospects of the negotiations; and of the apparent dispositions of the Governments of France and Spain towards the United States. Should either of them, particularly the former, not only reject our proposition but manifest a spirit from which a determined violation of our rights, and its hostile consequences, may be justly apprehended, it will become necessary to give

There is no obstruction, the whole being level and mud or sand. But supposing even a portage there, the advantage of american houses settled in a american *port* would soon give a preference over New Orleans to that port. The seaport may be perhaps on the main between Pearl & Pargacola rivers; but certainly on the Island called "Ship Island" as through the passage between that & the next island there are more than 20 feet water & good anchorage close to the shore which faces the main. A frigate of 36 guns was seen there by E. Jones, (the first clerk in my office who is brother of our late consul at New Orleans & lived ten years with him in W. Florida) & it is the reason of its bearing that name. Judge Bay says that there is another island, called Deer Island close to the entrance of Lake Pontchartrain which affords the same advantages. That Jones disbelieves; but the other is certain, and as it is about half way between Mobile & the Lake ; as the whole navigation between these two places is locked in by the Islands & safe even for open boats & canoes ; that island would become the proper seaport for both rivers Mississippi and Mobile; for you can bring but 9 feet up Mobile bay, 7 feet over the bar of Lake Pontchartrain & 15 over the bar at the mouth of the Mississippi. It results from all that, that the possession of West Florida, even without New Orleans island, is extremely inmportant, and that if it can be obtained, it ought expressly to include all the islands within twenty leagues or such distance as to include those which are marked on the map.—*Enclosed to James Monroe*, 1 *Mar*. 1803—*Mad. MSS.*

ulterior instructions abroad as well as to make arrangements at home, which will require the earliest possible notice.

The inclosed letters to our Bankers at Amsterdam and London, authorize them to pay your drafts for expences, as above referred to, and as you shall find it most convenient to draw upon the one or the other. Your experience will suggest to you the necessity of taking exact vouchers in all cases of expenditure, in order to the settlement of your accounts.

Should you find it necessary to appoint a private Secretary on your arrival in Europe, you are authorized to do so, allowing him for his service at the rate of 1350 dollars p annum. If he should live in your family, the expences of his maintenance and travelling will be included in your accounts; but he cannot be allowed any thing separately for expenses and his salary will cease when the three months allowed for your return commence. As he will have been found in France or Spain it will not be unjust to leave him there without an extra allowance for returning.

I have the honor to be, &c.

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## TO CHARLES PINCKNEY.

D. OF S. MSS. INSTR.

DEPARTMENT OF STATE, March 8th—1803.

SIR,

My last letter was of January 18. Yours since received are of 6th and 28th of November.

Our latest authentic information from New Orleans is of January 20. At that date, the Edict of the Intendant against our right of deposit had not been revoked, altho' the letters to him and the Governor from the Spanish Minister here had been previously received. And it appears that the first outrage had been followed by orders of the most rigid tenor against every hospitable intercourse between our Citizens navigating the river, and the Spanish inhabitants.

This continuation of the obstruction to our trade, and the

approach of the season for carrying down the Mississippi the exports of the Western Country, have had the natural effect of increasing the Western irritation, and emboldening the advocates for an immediate redress by arms. Among the papers inclosed you will find the propositions moved in the Senate by Mr. Ross of Pennsylvania. They were debated at considerable length and with much ardour; and on the question had eleven votes in their favour against fourteen. The resolutions moved by Mr. Breckenridge, and which have passed into a law, will with the law itself be also found among the inclosed papers.

These proceedings ought more and more to convince the Spanish Government that it must not only maintain good faith with the United States, but must add to this pledge of peace, some provident and effectual arrangement, as heretofore urged, for controuling or correcting the wrongs of Spanish Officers in America, without the necessity of crossing the Atlantic for the purpose. The same proceedings will shew at the same time that with proper dispositions and arrangement on the part of Spain, she may reckon with confidence, on harmony and friendship with this Country. Notwithstanding the deep stroke made at our rights and our interests, and the opportunity given for self redress in a summary manner, a love of peace, a respect for the just usages of Nations, and a reliance on the voluntary justice of the Spanish Government, have given a preference to remonstrance, as the first appeal on the occasion, and to negotiation as a source of adequate provisions for perpetuating the good understanding between the two nations; the measures taken on the proposition of Mr. Breckenridge being merely those of ordinary precaution and precisely similar to those which accompanied the mission of Mr. Jay to Great Britain in 1794. Should the deposit however not be restored in time for the arrival of the Spring craft, a new crisis will occur, which it is presumed that the Spanish Government will have been stimulated to prevent by the very heavy claims of indemnification to which it would be otherwise fairly subjected. The Marquis

de Casa Yrujo does not yet despair of receiving from New Orleans favourable answers to his letters; but the remedy seems now to be more reasonably expected from Madrid. If the attention of the Spanish Government should not have been sufficiently quickened by the first notice of the proceeding from its own affairs; we hope that the energy of your interpositions will have overcome its tardy habits, and have produced an instant dispatch of the necessary orders.[1]

[1]Madison instructed Pinckney on March 21, 1803 : Since my letter of the 8th instant, the Marquis d'Yrujo has received answers to his letters to the Governor and Intendant of Louisiana in which it is stated by the latter, as well as the former officer, that the suspension of our deposit, was not the effect of any orders from the Spanish Government. No intimation however was given that the suspension would be removed in consequence of the original interposition of the Spanish Minister. In this state of things, rendered the more critical by the rising indignation of the Western Country, and the approach of the season when the privation of the deposit would be felt in all its force, a letter was written from this Department, to the Spanish Minister, of which a copy is inclosed. You will find by the tenor of his to the Secretary of State, of which a printed translation is also inclosed, that he has taken on himself to insure a correction of the wrong which has been committed. It can scarcely be doubted that his prudent zeal to preserve tranquility between Spain and the United States, and to save the former from the heavy damages likely to fall on her, will be approved by his government; and it is to be hoped that the energy of his interposition with the local authority at New Orleans, will be effectual, in case these authorities should not have previously changed hands. Should such a change have taken place, the letter from Mr. Pichon the charge d'Affaires of the French Republic of which a printed translation is likewise inclosed is well adapted to give a right turn to the conduct of the Spanish Agents. In whatever hands the Mouth of the Mississippi may be, it is essential to peace, as well as to right, that the gifts of nature, and the guarantees of Treaty should be duly respected.

It appears by a letter of February 15 from the Vice Agent of the United States at New Orleans, that the Intendant had opened the market there for provisions going down the Mississippi. This measure is represented as essential to the subsistance of the Colony, and if so, makes the folly of the Intendant, as conspicuous as his arrogance, in provoking the resentments of a powerful neighbour, from whose good will the necessaries of life were to be drawn.—*D. of S. MSS. Instr.*

Mr. Monroe was to sail from New York for Havre de Grace on yesterday. He carries with him the instructions in which you are joined with him, as well as those which include Mr. Livingston. . . . . .

TO ROBERT R. LIVINGSTON AND JAMES MONROE.

D. OF S. MSS. INSTR.

DEPARTMENT OF STATE, April 18th—1803.

GENTLEMEN,

A month having elapsed since the departure of Mr. Monroe, it may be presumed that by the time this reaches you, communications will have passed with the French Government sufficiently explaining its views towards the United States, and preparing the way for the ulterior instructions which the President thinks proper should now be given.

In case a conventional arrangement with France should have resulted from the negotiations with which you are charged; or in case such should not have been the result; but no doubt should be left that the French Government means to respect our rights and to cultivate sincerely peace and friendship with the United States, it will be expedient for you to make such communications to the British Government as will assure it that nothing has been done inconsistent with our good faith, and as will prevent a diminution of the good understanding which subsists between the two Countries.

If the French Government instead of friendly arrangements, or views should be found to meditate hostilities or to have formed projects which will constrain the United States to resort to hostilities, such communications are then to be held with the British Government as will sound its dispositions and invite its concurrence in the War. Your own prudence will suggest that the communications be so made as on one hand, not to precipitate France into hostile operations, and on the other not to lead Great Britain from the supposition that war depends on the choice of the United States and that their

choice of war will depend on her participation in it. If war is to be the result, it is manifestly desirable that it be de-delayed, until the certainty of this result can be known, and the Legislative and other provisions can be made here; and also of great importance that the certainty should not be known to Great Britain who might take advantage of the posture of things to press on the United States disagreeable conditions of her entering into the war.

It will probably be most convenient in exchanging ideas with the British Government, to make use of its public Minister at Paris; as less likely to alarm and stimulate the French Government, and to raise the pretensions of the British Government, than the repairing of either of you to London, which might be viewed by both as a signal of rupture. The latter course however, may possibly be rendered most eligible by the pressure of the crisis.

Notwithstanding the just repugnance of this Country to a coalition of any sort with the belligerent policies of Europe, the advantages to be derived from the co-operation of Great Britain in a war of the United States, at this period, against France and her allies, are too obvious and too important to be renounced. And notwithstanding the apparent disinclination of the British councils to a renewal of hostilities with France, it will probably yield to the various motives which will be felt to have the United States in the scale of Britain against France, and particularly for the immediate purpose of defeating a project of the latter which has evidently created much solicitude in the British Government.

The price which she may attach to her co-operation cannot be foreseen, and therefore cannot be the subject of full and precise instructions. It may be expected that she will insist at least on a stipulation, that neither of the parties shall make peace or truce without the consent of the other, and as such an article cannot be deemed unreasonable, and will secure us against the possibility of her being detached in the course of the war, by seducing overtures from France, it will not be proper to raise difficulties on that account. It

may be useful however to draw from her a definition, as far as the case will admit, of the objects contemplated by her, that whenever with ours they may be attainable by peace she may be duly pressed to listen to it. Such an explanation will be the more reasonable, as the objects of the United States will be so fair and so well known.

It is equally probable that a stipulation of commercial advantages in the Mississippi beyond those secured by existing treaties, will be required. On this point it may be answered at once that Great Britain shall enjoy a free trade with all of the ports to be acquired by the United States, on the terms allowed to the most favored nation in the ports generally of the United States. If made an essential condition, you may admit that in the ports to be acquired within the Mississippi, the trade of her subjects shall be on the same footing for a term of about ten years with that of our own citizens. But the United States are not to be bound to the exclusion of the trade of any particular nation or nations.

Should a mutual guarantee of the existing possessions, or of the conquests to be made by the parties, be proposed, it must be explicitly rejected as of no value to the United States, and as entangling them in the frequent wars of that nation with other powers, and very possibly in disputes with that nation itself.

The anxiety which Great Britain has shown to extend her domain to the Mississippi, the uncertain extent of her claims, from North to South, beyond the Western limits of the United States, and the attention she has paid to the North West coast of America, make it probable that she will connect with a war on this occasion, a pretension to the acquisition of the Country on the West side of the Mississippi, understood to be ceded by Spain to France, or at least of that portion of it lying between that River and the Missoury. The evils involved in such an extension of her possessions in our neighborhood, and in such a hold on the Mississippi, are obvious. The acquisition is the more objectionable as it would be extremely displeasing to our western citizens: and as its evident bearing

on South America might be expected to arouse all the jealousies of France and Spain, and to prolong the war on which the event would depend. Should this pretension therefore be pressed, it must be resisted, as altogether repugnant to the sentiments, and the sound policy of the United States. But it may be agreed, in alleviation of any disappointment of Great Britain that France shall not be allowed to retain or acquire any part of the territory, from which she herself would be precluded.

The moment the prospect of war shall require the precaution you will not omit to give confidential notice to our public Ministers and Consuls, and to our naval commanders in the Mediterranean, that our commerce and public ships may be as little exposed to the dangers as possible. It may under certain circumstances be proper to notify the danger immediately to the Collectors in the principal ports of the U. States.

Herewith inclosed are two blank plenipotentiary Commissions and letters of credence to the French and British Governments. Those for the British Government are to be filled with the name of Mr. Monroe, unless his Mission to France should have an issue likely to be disagreeable to Great Britain; in which case the President would wish Mr. Livingston inserted if the translation be not disagreeable to him, and the name of Mr. Monroe to be inserted in the Commission for the French Republic. To provide for the event of Mr. Livingston's translation, a letter of leave is inclosed.

A separate letter to you is also inclosed, authorizing you to enter into such communications and conferences with British Ministers as may possibly be required by the conduct of France. The letter is made a separate one that it may be used with the effect, but without the formality of a commission. It is hoped that sound calculations of interest as well as a sense of right in the French Government, will prevent the necessity of using the authority expressed in the letter. In a contrary state of things the President relies on your own information, to be gained on the spot, and on your best discretion to open with advantage the communications with the British Gov-

ernment, and to proportion the degree of an understanding with it, to the indications of an approaching war with France. Of these indications you will be best able to judge. It will only be observed to you that if France should avow or evince a determination to deny to the United States the free navigation of the Mississippi, your consultations with Great Britain may be held on the ground that war is inevitable. Should the navigation not be disputed, and the deposit alone be denied, it will be prudent to adapt your consultations to the possibility that Congress may distinguish between the two cases, and make a question how far the latter right may call for an instant resort to arms, or how far a procrastination of that remedy may be suggested and justified by the prospect of a more favorable conjuncture.

These instructions have thus far supposed that Great Britain and France are at peace, and that neither of them intend at present to interrupt it. Should war have actually commenced, or its approach be certain, France will no doubt be the more apt to concur in friendly accommodations with us, and Great Britain the more desirous to engaging us on her side. You will, of course, avail yourselves of this posture of things, for avoiding the necessity of recurring to Great Britain, or if the necessity cannot be avoided, for fashioning her disposition to arrangements which may be the least inconvenient to the United States. Whatever connection indeed may be eventually formed with Great Britain, in reference to war, the policy of the United States requires that it be as little entangling as the nature of the case will permit.

Our latest authentic information from New Orleans is of the 25th of February. At that date the port had been opened for provisions carried down the Mississippi, subject to a duty of 6 p Cent, if consumed in the province, and an additional duty if exported; with a restriction in the latter case to Spanish bottoms, and to the external ports permitted by Spain to her colonial trade. A second letter written by the Spanish Minister here, had been received by the Intendant, but without effect. On the 10th of March his interposition was

repeated in a form, which, you will find by his translated communication to the Department of State, in one of the inclosed papers, was meant to be absolutely effectual. You will find in the same paper the translation of a letter from the French charge d'Affaires here, to the Governor of Louisiana, written with a co-operating view. A provisional letter to any French Agents, who might have arrived, had been previously written by him, in consequence of a note from this Department founded on a document published at New Orleans shewing that orders had been given by the Spanish Government for the surrender of the province to France; and he has of late addressed a third letter on the subject to the Prefect said to have arrived at New Orleans. It does not appear however, from any accounts received, that Louisiana has yet changed hands.

What the result of the several measures taken for restoring the right of deposit will be, remains to be seen. A representation on the subject was made by Mr. Graham, in the absence of Mr. Pinckney, to the Spanish Government on the 3d of February. No answer had been received on the 8th, but Mr. Graham was led by circumstances to make no particular inference from the delay. The silence of the French Government to Mr. Livingston's representation as stated in his letter of the day of is a very unfavorable indication. It might have been expected from the assurances given of an intention to observe the Treaty between Spain and the United States, and to cultivate the friendship of the latter, that the occasion would have been seized for evincing the sincerity of the French Government: and it may still be expected that no interposition that may be required by the actual state of things will be witheld, if peace and friendship with theUnited States be really the objects of that Government. Of this the Mission of Mr. Monroe, and the steps taken by you on his arrival, will doubtless have impressed the proper convictions.

During this suspense of the rightful commerce of our Western Citizens, their conduct has been and continues to be

highly exemplary. With the just sensibility produced by the wrongs done them, they have united a patient confidence in the measures and views of their Government. The justice of this observation will be confirmed to you by manifestations contained in the Western Newspapers herewith inclosed; and if duly appreciated, will not lessen the force of prudential as well as of other motives, for correcting past, and avoiding future trespasses on American rights.

April 20th.

The letter from the Marquis D'Yrujo, of which you will find a tranlsated copy in the inclosed newspaper of this date, was yesterday received. The letters to which it refers, as containing orders for the reestablishment of our deposit at New Orleans were immediately forwarded. They will arrive in time we hope, to mitigate considerably the losses from the misconduct of the Spanish Intendant; and they are the more acceptable as they are an evidence of the respect in the Government of Spain for our rights and our friendship.

From the allusion in this communication from the Spanish Minister to a future agreement between the two Governments on the subject of an equivalent deposit, it would seem that the Spanish Government regards the Cession to France as either no longer in force, or not soon to be carried into execution. However this may be, it will not be allowed, any more than the result of our remonstrance to Spain on the violation of our rights, to slacken the negotiations for the greater security and the enlargement of these rights. Whether the French or the Spaniards or both are to be our neighbours, the considerations which led to the measures taken with respect to these important objects, still require that they should be pursued into all the success that may be attainable.

With sentiments of Great respect, &c

TO ROBERT R. LIVINGSTON AND JAMES MONROE.

D. OF S. MSS. INSTR.

DEPARTMENT OF STATE April 18th—1803.

GENTLEMEN,

The reasonable and friendly views with which you have been instructed by the President to enter into negotiations with the French Government, justify him in expecting from them an issue favorable to the tranquility and to the useful relations between the two countries. It is not forgotten however that these views, instead of being reciprocal, may find on the part of France, a temper adverse to harmony, and schemes of ambition, requiring on the part of the United States, as well as of others, the arrangements suggested by a provident regard to events. Among these arrangements, the President conceives that a common interest may recommend a candid understanding and a closer connection with Great Britain; and he presumes that the occasion may present itself to the British Government in the same light. He accordingly authorizes you, or either of you in case the prospect of your discussions with the French Government should make it expedient, to open a confidential communication with Ministers of the British Government, and to confer freely and fully on the precautions and provisions best adapted to the crisis, and in which that Government may be disposed to concur, transmitting to your own without delay, the result of these consultations.

With sentiments of high respect, &c

TO ROBERT R. LIVINGSTON.

D. OF S. MSS. INSTR.

DEPARTMENT OF STATE May 25th, 1803.

SIR,

Your several letters of March 3, 11, 18, & 24 with their inclosures have been duly received; as has been that of March 12, to the President. According to the request in this last, I now acknowledge also, or perhaps repeat the acknowl-

edgment of the two papers inclosed, the one in your letter of Feby. 26, the other in that of August 10-1802.

The assurances given by the Chief Consul on the subject of our claims, cannot but be acceptable, altho' they amount to less than justice; because no more than justice would have been done, if the claims had been satisfied without the delay which has intervened, and according to the example of good faith and punctuality in executing the Treaty given by the United States. It is to be hoped that the sincerity of these assurances will be verified by the success of the measures you are taking for a final and favorable settlement in behalf of our Citizens, who have never doubted, as far as I know, your solicitude or your exertions to obtain justice for them.

The assurances given at the same time, by the Chief Consul of his regard for the United States, and of his personal esteem for their Chief magistrate, are entitled also to favorable attention as an indication that a juster value begins to be placed on our friendly relations to the French Republic. Whether this language of the French Government be the effect of the political crisis in which it finds itself, or of a growing conviction of the important destinies and honorable policy of the United States; or, as is probable, of both these considerations, you will in return, communicate the assurances with which you are charged by the President, of his disposition to cherish a reciprocity of these sentiments, and that sincere amity between the two nations which is prescribed to both, by such weighty advantages.

The persevering evasion of your demands on the subject of the deposit at New Orleans, and generally of the rights of the United States as fixed by their Treaty with Spain, is not a little astonishing. It is as difficult to be reconciled with the sincerity of the late professions of the French Government and with the policy which the moment dictates to it, as with any other rational motives. It is the more extraordinary too, as it appears by a late communication from the Spanish Government to Mr. Pinckney, of which he says he forwarded a copy to Paris, and of which another is herewith inclosed,

that the Treaty of Cession expressly saves all rights previously stipulated to other nations. A conduct so inexplicable is little fitted to inspire confidence, or to strengthen friendship; and rendered proper the peremptory declaration contained in your note of the 16th of March. The negotiations succeeding the arrival of Mr. Monroe, cannot fail to draw out the views of France on this important subject.

You were informed in my letters of the 18th and 20th of April that orders had been transmitted by the Spanish Government for restoring the deposit. The answers from New Orleans to the Spanish and French Ministers here, shew that their successive interpositions, including the peremptory one from the Marquis D'Yrujo of the 11th of March, were all unavailing. The orders of the King of Spain will no doubt be obeyed, if they arrive before possession be given to the French authority; nor is it presumable that in the event they would be disregarded. Still it is possible that the French Agents may chuse to wait for the French construction of the Treaty, before they relinquish the ground taken by the Intendant, and the more possible as the orders to the Intendant may contain no disavowal of his construction of it. Under these circumstances it will be incumbent on the French Government to hasten the orders necessary to guard against a prolongation of the evil, and the very serious consequences incident to it. It cannot be too much pressed that the justice and friendship of France, in relation to our rights and interests on the Mississippi, will be the principal rules by which we shall measure her views respecting the United States, and by which the United States will shape the course of their future policy towards her.

Your answer to the complaint of a traffic of our Citizens with the negroes of St. Domingo, and of subscriptions in Philada. in behalf of the latter, was founded in just observations. You may now add, with respect to the subscriptions, the positive fact, that no such subscriptions have ever been instituted; and with respect to the other complaint, that no such traffic is known or believed to have taken place; or if it

has taken place, that it must have been from foreign ports, and not from ports of the United States.

You will find by the memorial herewith inclosed from three citizens of the United States now imprisoned at Jackmel, that whilst we repel unfounded complaints, on the part of France, the best founded ones exist on ours. The letter written to Mr. Pichon, on this occasion, of which a copy is inclosed, will suggest the proper representation to the French Government. It is to be wished that his answer to me, may be a type of that which will be given to you. The case of Capts. Rogers and Davidson will connect itself with that now committed to your attention.

We are still ignorant of the result of the armed negotiations between Great Britain and France. Should it be war, or should the uncertainty of the result, be spun out, the crisis may be favorable to our rights and our just objects; and the President assures himself that the proper use will be made of it. Mr. Monroe's arrival has not yet been mentioned in any accounts which have not been contradicted.[1]

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[1] TO JAMES MONROE.

WASHINGTON, Apl 20, 1803.

DEAR SIR You will receive with this all the communications claimed by the actual & eventual posture of our affairs in the hands of yourself & M[r] Livingston. You will find also that the Spanish Gov[t] has pretty promptly corrected the wrong done by its Officer at N. Orleans. This event will be a heavy blow to the clamorous for war, and will be very soothing to those immediately interested in the trade of the Missisipi. The temper manifested by our Western Citizens has been throughout the best that can be conceived. The real injury from the suspension of the deposit was *how[r]* much lessened* by the previous destruction of the *intire crop* of *wheat* in Kentucky, by the number of *sea vessels built* on the *Ohio* and *by throngs* of *vessels* from *Atlantic ports* to the Mississippi, some of which *ascended* to the Natches. The permission also to supply the market at N. O. & to ship the surplus as Spanish property to Spanish ports, was *turned to good account.* The trial *therefore has been much alleviated.* Certain it is that the *hearts* and *hopes of* the *Western people* are strongly fixed on the *Mississippi for* the future *boundary.*

* Italics for cypher.

TO ROBERT R. LIVINGSTON AND JAMES MONROE.

D. OF S. MSS. INSTR.

DEPARTMENT OF STATE, May 28th 1803

GENTLEMEN,

Since my last which was of April 18th the tenor of our information from France and Great Britain renders a war between these powers in the highest degree probable. It may be inferred at the same time from the information given by Mr. Livingston and Mr. King, that the importance of the United States is rising fast in the estimation both of the French and the British Cabinets, and that Louisiana is as much a subject of solicitude with the latter, as it has been an object of acquisition with the former. The crises presented by this jealous and hostile attitude of those rival

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Should no improvement of existing *rights be gained* the *disappointment* will be *great.* Still *respect for principle* & character, aversion to *war* & taxes the hope of a speedy conjuncture *more favorable*, and *attachment* to the present order of things will be persuasive *exhortations to patience.* It is even a doubt with some of the best judges whether the *deposit alone* would not be *waved* for a while rather than it should be the immediate ground of *war and an alliance with England.* This suggested a particular passage in the official letter now sent you & Mr L.

The elections in *New England are running much against the administration.* In *Virginia* the result is but very partially *known. Brent* is *outvoted* by *Lewis.* In general things *continue well in that state.*

The affair between *the President* and *J. Walker* has had a happy *ecclaircissement.* Even this general communication is for your *own bosom* as already *privy to the affair.*

I have recd a very friendly letter from Genl Fayette, which I shall answer as soon as I can get some further information. We are all much distressed by his late accident, and are anxious for every proof to be given him of the affection of this Country. Congress found an occasion of voting about 11 or 12,000 acres of land N. W. of the Ohio with liberty to locate it any where. This may be made worth now probably abt 20,000 dollars. In a little time the value must greatly increase. Whether anything else can or will be done, you can judge as well as myself. Assure him of my undiminished friendship for him, which he knows to have been perfectly sincere and ardent.

Mr Coleman has sent a list of the furniture. It is some articles short of your list, & which contains a few we shall not want. They are not yet arrived here.—*Mad. MSS.*

powers has doubtless been seen in its bearings on the arrangements contemplated in your Commission and instructions; is hoped, tho' we have not yet heard, that the arrival of Mr. Monroe will have taken place in time, to give full advantage to the means of turning the actual state of things to the just benefit of the United States.

The solicitude of England with respect to Louisiana is sufficiently evinced by her controuling the French expedition from Holland to that Country. But her views have been particularly unfolded to Mr. King by Mr. Addington, who frankly told him that in case a war should happen, it would perhaps be one of their first steps to occupy New Orleans, adding that it would not be to keep it, for that England would not accept the Country were all agreed to give it to her, but to prevent another power from obtaining it, which in his opinion would be best effected by its belonging to the United States; and concluding with assurances that nothing should be done injurious to their interests. If the Councils of France should be guided by half the wisdom which is here displayed on the part of her rival, your negotiations will be made easy, and the result of them very satisfactory.

Altho' the immediate object of Great Britain in occupying New Orleans may be that of excluding France, and altho' her prudence may renounce the fallacious advantage of retaining it for herself, it is not to be presumed that she will yield it to the United States without endeavouring to make it the ground of some arrangement that will directly or indirectly draw them into her war, or of some important concessions in favour of her commerce at the expence of our own. This consideration necessarily connects itself with the explanation, and friendly assurances of Mr. Addington, and so far leaves in force the inducement to accomplish our object by an immediate bargain with France.

In forming this bargain however, the prospect held out by the British Minister, with the nature of the crisis itself, authorizes us to expect better terms than your original instructions allow.

The President thinks it will be ineligible under such circumstances that any Convention whatever on the subject should be entered into, that will not secure to the United States the jurisdiction of a reasonable district on some convenient part of the Bank of the Mississippi.

He is made the more anxious also by the manner in which the British Government has opened itself to our Minister as well as by other considerations, that as little concession as possible should be made in the terms with France on points disagreeable to Great Briatin, and particularly that the acknowledgment of the right of France as holding one shore of the Mississippi to shut it against British vessels, should be avoided, if not essential to the attainment of the great objects we have in view, on terms otherwise highly expedient. It is desirable that such an acknowledgement should not even be admitted into the discussion.

The guarantee of the Country beyond the Mississippi is another condition, which it will be well to avoid if possible, not only for the reasons you already possess, but because it seems not improbable from the communications of Mr. King that Great Britain is meditating plans for the emancipation and independence of the whole of the American Continent, South of the United States, and consequently that such guarantee would not only be disagreeable to her, but embarrassing to the United States. Should War indeed precede your Conventional arrangements with France, the guarantee, if admitted at all, must necessarily be suspended and limited in such a manner as to be applicable only to the state of things as it may be fixed by a peace.

The proposed occupancy of New Orleans by Great Britain, suggests a further precaution. Should possession be taken by her, and the preliminary sum of 2 Millions or any part of it be paid to France, risks and disputes might ensue, which make it advisable to postpone the payment till possession shall be given to the United States, or if this cannot be done, obtain possible security against eventual loss.

As the question may arise, how far in a state of War, one

of the parties can of right convey territory to a neutral power, and thereby deprive its enemy of the chance of conquest incident to war, especially when the conquest may have been actually projected, it is thought proper to observe to you 1st That in the present case the project of peaceable acquisition by the United States originated prior to the War, and consequently before a project of conquest could have existed. 2dly That the right of a neutral to procure for itself by a bona fide, transaction property of any sort from a belligerent power ought not to be frustrated by the chance that a rightful conquest thereof might thereby be precluded. A contrary doctrine would sacrifice the just interests of peace to the unreasonable pretensions of war, and the positive rights of one nation to the possible rights of another. A restraint on the alienation of territory from a nation at War to a nation at peace is imposed only in cases where the proceeding might have a collusive reference to the existence of the War, and might be calculated to save the property from danger, by placing it in secret trust, to be reconveyed on the return of peace. No objection of this sort can be made to the acquisitions we have in view. The measures taken on this subject, were taken before the existence or the appearance of war, and they will be pursued as they were planned, with the bona fide purpose of vesting the acquisition forever in the United States.

With these observations, you will be left to do the best you can, under all circumstances, for the interest of your Country; keeping in mind that the rights we assert are clear, that the objects we pursue are just, and that you will be warranted in providing for both by taking every fair advantage of emergencies.

For the course of information relating to the deposit at New Orleans, I refer you to my letter of the 25th inst; to Mr. Livingston.

TO ROBERT R. LIVINGSTON

D. OF S. MSS. INSTR.

DEPARTMENT OF STATE July 29th 1803.

SIR,

Since the date of my last which was May 24 I have received your several letters of Arpil 11, 13 & 17 & May 12th. As they relate almost wholly to the subject which was happily terminated on the 30th of April a particular answer is rendered unnecessary by that event, and by the answer which goes by this conveyance to the joint letter from yourself and Mr. Monroe of the 13th of May. It will only be observed first that the difference in the diplomatic titles given to Mr. Monroe from that given to you, and which you understood to have ranked him above you was the result merely of an error in the Clerk who copied the document and which escaped attention when they were signed. It was not the intention of the President that any distinction of grade should be made between you. Indeed, according to the authority of Vattell the characters of Minister Plenipotentiary and Envoy Extraordinary are precisely of the same grade, altho' it is said that the usage, in France particularly, does not correspond with this idea. Secondly, that the relation of the First Consul to the Italian Republic, received the compliment, deemed sufficient in the answer to a Note of Mr. Pichon, communicating the flag, of that Nation. A copy of the communication and of the answer are now inclosed.

The boundaries of Louisiana seem to be so imperfectly understood and are of so much importance, that the President wishes them to be investigated wherever information is likely to be obtained. You will be pleased to attend particularly to this object as it relates to the Spanish possessions both on the West and on the East side of the Mississippi. The proofs countenancing our claim to a part of West Florida may be of immediate use in the negotiations which are to take place at Madrid. Should Mr. Monroe have proceeded thither as is probable, and any such proofs should after his departure

have come to your knowledge, you will of course have transmitted them to him.

You will find by our Gazettes that your memorial drawn up about a year ago on the subject of Louisiana, has found its way into public circulation. The passages in it which strike at G. Britain have undergone some comments, and will probably be conveyed to the attention of that Government. The document appears to have been sent from Paris, where you will be able no doubt to trace the indiscretion to its author.

No answer has yet been received either from you or Mr. Monroe to the diplomatic arrangement for London and Paris. The importance of shortening the interval at the former, and preventing one at the latter, makes us anxious on this point. As your late letters have not repeated your intention of returning home this fall, it is hoped that the interesting scenes which have since supervened may reconcile you to a longer stay in Europe.

I have the honor, &c

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TO JAMES MONROE.

D. OF S. MSS. INSTR.

DEPARTMENT OF STATE July 29 1803.

SIR,

The communication by Mr. Hughes including the Treaty and Convention signed with the French Government, were safely delivered on the 14 instant. Inclosed is a copy of a letter written in consequence of them to Mr. Livingston and yourself.

On the presumption, which accords with the information given by Mr. Hughes, that you will have proceeded to Madrid in pursuance of the instructions of the 17th February last, it is thought proper to observe to you, that altho' Louisiana may in some respects be more important than the Floridas, and has more than exhausted the funds allotted for the pur-

chase of the latter, the acquisition of the Floridas is still to be pursued, especially as the crisis must be favorable to it.

You will be at no loss for the arguments most likely to have weight in prevailing on Spain to yield to our wishes. These Colonies, separated from her other territory on this Continent, by New Orleans, the Mississippi, and the whole of Western Louisiana, are now of less value to her than ever, whilst to the United States, they retain the peculiar importance derived from their position, and their relations to us thro' the navigable rivers running from the U States into the Gulph of Mexico. In the hands of Spain they must ever be a dead expence in time of war, and at all times a source of irritation and ill blood with the United States. The Spanish Government must understand in fact that the United States can never consider the amicable relations between Spain and them as definitively and permanently secured, without an arrangement on this subject, which will substitute the manifest indications of nature, for the artificial and inconvenient state of things now existing.

The advantage to be derived to your negotiations from the war which has just commenced, will certainlv not escape you. Powerful, and it might be presumed, effectual use may be made of the fact, that Great Britain meant to seize New Orleans with a view to the anxiety of the United States to obtain it;—and of the inference from the fact, that the same policy will be pursued with respect to the Floridas. Should Spain be [engaged?] in the war it cannot be doubted that they will be quickly occupied by a British force, and held out on some condition or other, to the United States. Should Spain be still at peace, and wish not to lose her neutrality, she should reflect that the facility and policy of seizing the Floridas, must strengthen the temptations of G. Britain to force her into the war. In every view, it will be better for Spain, that the Floridas should be in the hands of the United States, than of Great Britain; and equally so, that they should be ceded to us on beneficial terms by herself, than that they should find their way to us thro' the hands of Great Britain.

The Spanish Government may be assured of the sincere and continued desire of the United States to live in harmony with Spain; that this motive enters deeply into the solicitude of their Government for a removal of the danger to it, which is inseparable from such a neighborhood as that of the Floridas; and that having, by a late Convention with G. Britain, adjusted every territorial question and interest with that Nation, and the Treaty with France concerning Louisiana having just done the same with her, it only remains that the example be copied into an arrangement with Spain, who is evidently not less interested in it than we are.

By the inclosed note of the Spanish Minister here, you will see the refusal of Spain to listen to our past overtures, with the reasons for the refusal. The answer to that communication is also inclosed. The reply to such reasons will be very easy. Neither the reputation nor the duty of his Catholic Majesty can suffer from any measure founded in wisdom, and the true interests of Spain. There is as little ground for supposing, that the maritime powers of Europe will complain of, or be dissatisfied with a Cession of the two Floridas to the United States, more than with the late cession of Louisiana by Spain to France, or more than with the former cessions thro' which the Floridas have passed. What the Treaties are subsequent to that of Utrecht, which are alleged to preclude Spain from the proposed alienation, have not been examined. Admitting them to exist in the sense put upon them, there is probably no maritime power who would not readily acquiesce in our acquisition of the Floridas, as more advantageous to itself, than the retention of them by Spain, shut up against all foreign commerce, and liable at every moment to be thrown into the preponderant scale of G. Britain. Great Britain herself would unquestionably have no objection to their being transferred to us; unless it should be drawn from her intention to conquer them for herself, or from the use she might expect to make of them, in a negotiation with the United States. And with respect to France, silence at least is imposed on her by the Cession to the United States, of the

Province ceded to her by Spain; not to mention, that she must wish to see the Floridas, like Louisiana kept out of the hands of Great Britain, and has doubtless felt that motive in promising her good offices with Spain for obtaining these possessions for the United States. Of this promise you will of course make the proper use in your negotiations.

For the price to be given for the Floridas, you are referred generally to the original instructions on this point. Altho' the change of circumstances lessens the anxiety for acquiring immediately a territory which now more certainly than ever, must drop into our hands, and notwithstanding the pressure of the bargain with France on our Treasury; yet for the sake of a peaceable and fair completion of a great object, you are permitted by the President in case a less sum will not be accepted, to give two Millions and a quarter of dollars, the sum heretofore apportioned to this purchase. It will be expected however, that the whole of it, if necessary be made applicable to the discharge of debts and damages claimed from Spain, as well those not yet admitted by the Spanish Government, as those covered by the Convention signed with it by Mr. Pinckney on the 11th day of Augt. 1802, and which was not ratified by the Senate because it embraced no more of the just responsibilities of Spain. On the subject of these claims, you will hold a strong language. The Spanish Government may be told plainly, that they will not be abandoned any farther than an impartial Tribunal may make exceptions to them. Energy in the appeal to its feelings, will not only tend to justice for past wrongs, but to prevent a repetition of them in case Spain should become a party to the present war.

In arranging the mode, the time, and the priority of paying the assumed debts, the ease of the Treasury is to be consulted as much as possible: less is not to be done with that view, than was enjoined in the case of the French debts to our Citizens. The stock to be engaged in the transaction is not to be made irredeemable, without a necessity not likely to arise; and the interest as well as the principal should be payable at the Treasury of the United States. The only admissible limita-

tion on the redemption of the stock is, that the holder shall not be paid off in less than about one fifth or one fourth of the amount in one year.

Indemnifications for the violation of our deposit at New Orleans have been constantly kept in view, in our remonstrances and demands on that subject. It will be desirable to comprehend them in the arrangement. A distinction however is to be made between the positive and specific damages sustained by individuals, and the general injuries accruing from that breach of Treaty. The latter could be provided for by a gross and vague estimate only, and need not be pressed, as an indispensable condition. The claim however, may be represented as strictly just, and a forbearance to insist on it, as an item in the valuable considerations for which the Cession is made. Greater stress may be laid on the positive and specific damages capable of being formally verified by individuals; but there is a point beyond which it may be prudent not to insist even here; especially as the incalculable advantage accruing from the acquisition of New Orleans, will diffuse a joy throughout the Western Country that will drown the sense of these little sacrifices. Should no bargain be made on the subject of the Floridas, our claims of every sort are to be kept in force. If it be impossible to bring Spain to a Cession of the whole of the two Floridas, a trial is to be made for obtaining either or any important part of either. The part of West Florida adjoining the territories now ours, and including the principal rivers falling into the Gulph, will be particularly important and convenient.

It is not improbable that Spain, in Treating on a Cession of the Floridas, may propose an exchange of them for Louisiana beyond the Mississippi, or may make a serious point of some particular boundary to that territory. Such an exchange is inadmissible. In intrinsic value there is no equality; besides the advantage, given us by the Western Bank, of the entire jurisdiction of the river. We are the less disposed also to make sacrifices to obtain the Floridas, because their position and the manifest course of events guarantee an early and

reasonable acquisition of them. With respect to the adjustment of a boundary between Louisiana and the Spanish territories, there might be no objection to combining it with a Cession of the Floridas, if our knowledge of the extent and character of Louisiana were less imperfect. At present any arrangement, would be a step too much in the dark to be hazarded, and this will be a proper answer to the Spanish Government. Perhaps the inter-communications with the Spanish Government on this subject with other opportunities at Madrid, may enable you to collect useful information, and proofs of the fixt limits, or of the want of fixt limits to Western Louisiana. Your enquiries may also be directed to the question whether any and how much of what passes for West Florida, be fairly included in the territory ceded to us by France. The treaties and transactions between Spain and France will claim particular attention in this enquiry.

Should no cession whatever be attainable, it will remain only, for the present, to provide for the free use of the rivers running from the United States into the Gulph. A convenient deposit is to be pressed as equally reasonable there as on the Mississippi; and the inconveniency experienced on the latter from the want of a jurisdiction over the deposit, will be an argument for such an improvement of the stipulation. The free use of those rivers for our external commerce, is to be insisted on as an important right, without which the United States can never be satisfied, and without an admission of which by Spain they can never confide either in her justice or her disposition to cultivate harmony and good neighborhood with them. It will not be advisable to commit the U States into the alternative of War or a compliance on the part of Spain; but no representation short of that, can be stronger than the case merits.

The instruction to urge on Spain some provision for preventing, or rectifying, by a delegated authority here, aggressions and abuses committed, by her Colonial officers, is to be regarded as of high importance. Nothing else may be able to save the U States from the necessity of doing themselves

justice. It cannot be expected that they will long continue to wait the delays and the difficulties of negotiating, on every emergency, beyond the Atlantic. It is more easy and more just, that Spain and other European nations, should establish a remedy on this side of the Atlantic where the source of the wrongs is established, than that the complaints of the United States should be carried to the other side, and perhaps wait till the Atlantic has moreover been twice crossed, in procuring information for the other party without which a decision may be refused.

The navigation of the Bay of St. Mary's is common to Spain and the United States; but a light house and the customary water marks can be established within the Spanish jurisdiction only. Hitherto the Spanish Officers have refused every proper accommodation on this subject. The case may be stated to the Government of Spain, with our just expectation that we may be permitted either to provide the requisite establishments ourselves, or to make use of those provided by Spain.

This letter will be addressed to Madrid; but as it is possible that you may not have left Paris, or may have proceeded to London, a copy will be forwarded to Paris, to be thence, if necessary, sent on to London. In case it should find you either at Paris or London, it must be left to your own decision how far the call for you at either of those places, ought to suspend these instructions. Should you decide to go to Madrid, it may be proper first to present your credence to the French or British Government, as the case may be; and to charge a fit person with the public business during your absence. Should you even be at Paris and your Commission filled up for London, it may be best to proceed first to London, if the call to Madrid be not very urgent.

I shall write to Mr. Pinckney and inform him that this letter is intended for his use jointly with yours; tho' addressed to you alone, because in part not applicable to him. Should you suspend or have suspended your visit to Madrid, you will please write to him also, giving him your ideas as to the ex-

pediency of prosecuting the object of the joint instructions or not, until you can be with him.

## TO ROBERT R. LIVINGSTON AND JAMES MONROE.[1]

D. OF S. MSS. INSTR.

DEPARTMENT OF STATE July 29th—1803.

GENTLEMEN,

Your dispatches, including the Treaty and two conventions signed with a French Plenipotentiary on the 30th of April, were safely delivered on the 14th by Mr. Hughes, to whose care you had committed them.

In concurring with the disposition of the French Government to treat for the whole of Louisiana, altho' the western

[1] TO JAMES MONROE.

WASHINGTON, July 30, 1803.

DEAR SIR I received your favor of by M^r Hughes, the bearer of the public despatches from you & M^r L. The purchase of Louisiana in its full extent, th^o' not contemplated is received with warm, & in a manner universal approbation. The uses to which it may be turned, render it a truly noble acquisition. Under prudent management it may be made to do much good as well as to prevent much evil. By lessening the military establishment otherwise requisite or countenanced, it will answer the double purpose of saving expence & favoring liberty. This is a point of view in which the Treaty will be particularly grateful to a most respectable description of our Citizens. It will be of great importance also to take the regulation & settlement of that Territory out of other hands, into those of the U. S. who will be able to manage both for the general interest & conveniency. By securing also the exclusive jurisdiction of the Mississippi to the mouth, a source of much perplexity & collision is effectually cut off.

The communications of *your** *colleague* hither, have fully *betrayed* the *feelings excited* by *your mess^rs*, and that *he was precipitating* the *business soon after y^r arrival* without respect to the measure of the *gov^t*, *to y^r self*, or to the advantage to be expected from *the presence & co-operation* of the more *immediate depository* of the objects and *sensibilities of his country* It is highly probable that if the *appeal* to the *French Gov^t* had been less *hackneyed* by the *ordinary minister* and been made under the

*Italics for cypher.

part of it was not embraced by your powers, you were justified by the solid reasons which you give for it, and I am charged by the President to express to you his entire approbation of your so doing.

This approbation is in no respect precluded by the silence of your Commission and instructions. When these were made out, the object of the most sanguine was limited to the establishment of the Mississippi as our boundary. It was not presumed that more could be sought by the United States either with a chance of success, or perhaps without being suspected of a greedy ambition, than the Island of New Orleans and the two Floridas, it being little doubted that the latter was or would be comprehended in the Cession from Spain to

*solemnity of a joint* and *extraordinary embassy* the *impression* would have been *greater & the gain better.*

What course will be taken by *his friends here remains to be seen.* You will find in the *gazettes a letter from Paris* understood to be *from Swan* inclosing a *copy of his memorial* representing it as *the primary cause of the cession, praising* the *patriotism* which undertook *so great a service without authority,* and *throwing your agency* out of any real *merit while* by good fortune it *snatched* the *ostensible merit.* This letter with the *memor*ˡ *has been published in all our papers* some of them making *comments favorable to Mr. Livingston,* others doing justice *to you, others ascribing* the *result* wholly to the *impending rupture.* Another *letter from Paris* has been *published w*ʰ *makes him Magnus Apollo.* The *publication* of the *memorial is so improper* and in reference to the *writer invites such strictures that* [an answer?] *from him is not to be presumed.* The *passages against Engl*ᵈ have not escaped the lash. It would not be very *wonderful if* they were to be *noticed formally or informally by the British Legation here.*

My public letter will shew the light in which the purchase of all Louisiana is viewed, and the manner in which it was thought proper to touch *Mr. L., in complaining* that the *comm*ⁿ *did not* authorize the *measure, notwithstanding* the information given that *he was negot*ᵈ· for *more than* the *East side of the Miss*ᵢ The pecuniary arrangements are much *disrelished,* particularly *by M*ʳ *Gallatin.* The irredeemability of the stock which *gives it a value above par,* the preference of the *creditors* to the *true object* in the *cash payment* and the barring of a *priority* among them, are *errors* most regarded. The origin of the two last is *easily understood.* The claims of the different *creditors rest on principles as different. . . .* —*Monroe MSS.*

France. To the acquisition of New Orleans and the Floridas, the provision was therefore accommodated. Nor was it to be supposed that in case the French Government should be willing to part with more than the Territory on our side of the Mississippi, an arrangement with Spain for restoring to her the territory on the other side would not be preferred to a sale of it to the United States. It might be added, that the ample views of the subject carried with him by Mr. Monroe and the confidence felt that your judicious management would make the most of favorable occurrences, lessened the necessity of multiplying provisions for every turn which your neogtiations might possibly take.

The effect of such considerations was diminished by no information or just presumptions whatever. The note of Mr. Livingston in particular stating to the French Government the idea of ceding the Western Country above the Arkansa and communicated to this Department in his letter of the 29th January, was not received here till April 5 more than a month after the Commission and instructions had been forwarded. And besides that this project not only left with France the possession and jurisdiction of one bank of the Mississippi from its mouth to the Arkansa, but a part of West Florida, the whole of East Florida, and the harbours for ships of war in the Gulph of Mexico, the letter inclosing the note intimated that it had been treated by the French Government with a decided neglect. In truth the communications in general between Mr. Livingston and the French Government, both of prior and subsequent date, manifested a repugnance to our views of purchase which left no expectation of any arrangement with France by which an extensive acquisition was to be made, unless in a favorable crisis of which advantage should be taken. Such was thought to be the crisis which gave birth to the extraordinary commission in which you are joined. It consisted of the state of things produced by the breach of our deposit at New Orleans, the situation of the French Islands, particularly the important Island of St. Domingo; the distress of the French

finances, the unsettled posture of Europe, the increasing jealousy between G Britain and France, and the known aversion of the former to see the mouth of the Mississippi in the hands of the latter. These considerations it was hoped, might so far open the eyes of France to her real interest and her ears to the monitory truths which were conveyed to her thro' different channels, as to reconcile her to the establishment of the Mississippi as a natural boundary to the United States; or at least to some concessions which would justify our patiently waiting for a fuller accomplishment of our wishes under auspicious events. The crisis relied on has derived peculiar force from the rapidity with which the complaints and questions between France and Great Britain ripened towards a rupture, and it is just ground for mutual and general felicitation, that it has issued under your zealous exertions, in the extensive acquisition beyond the Mississippi.

With respect to the terms on which the acquisition is made, there can be no doubt that the bargain will be regarded as on the whole highly advantageous. The pecuniary stipulations would have been more satisfactory, if they had departed less from the plan prescribed; and particularly if the two millions of dollars in cash, intended to reduce the price or hasten the delivery of possession had been so applied, and the assumed payments to American claimants on the footing specified in the instructions. The unexpected weight of the draught now to be made on the Treasury will be sensibly felt by it, and may possibly be inconvenient in relation to other important objects.

The President has issued his proclamation convening Congress on the 17th of October, in order that the exchange of the ratifications may be made within the time limitted. It is obvious that the exchange, to be within the time, must be made here and not at Paris; and we infer from your letter of that the ratifications of the Chief Consul are to be transmitted hither with that view.

I only add the wish of the President to know from you the understanding which prevailed in the negotiation with respect

to the Boundaries of Louisiana, and particularly the pretensions and proofs for carrying it to the River Perdigo, or for including any lesser portion of West Florida.

With high respect, &c.

## TO ROBERT R. LIVINGSTON.[1]

D. OF S. MSS. INSTR.

DEPARTMENT OF STATE October 6th–1803.

SIR,

My last was of July 29 written a few days before my departure for Virginia, whence I returned, as did the President, ten or twelve days ago. Your letters received since that date are May 20, June 3 and 25, July 11, 12 & 30th.

In the reply to the communication made by the French Government on the subject of the war, you are charged by the President to express the deep regret felt by the United States at an event so afflicting to humanity. Deploring all the calamities with which it is pregnant, they devoutly wish that

[1] TO JAMES MONROE.

WASHINGTON Oct. 10, 1803

DEAR SIR Finding that Mr. Purveyance is within reach of a few lines, I add them to what he is already charged with, to observe that Yrujo has written another remonstrance ag^st. our acquisition of Louisiana, alledging as a further objection that France by not obtaining the stipulated acknowledgme^ts. of the King of Etruria from the Courts of Petersburg & London had a defective title herself to the Cession. Nothing can be more absurd than these cavils on the part of Spain, unless it should be her using in support of them force ag^st. our taking possession. This she will scarcely attempt, if not backed by France, w^ch. we hope is impossible. I am writing on this subject to Livingston & Pinkney. I have already done so to Yrujo giving him to understand, that we shall not withhold any means that may be rendered necessary to secure our object. Pichon is perfectly well disposed, is offended with the Spanish Minister, & if left under the orders he now has, will cooperate zealously, with an honest view to the honor & obligations of his own Country. On our part I trust every thing that the crisis demands will be done, and that we shall speedily be in possession of the valuable object which the Treaty with France has gained for us. Baring is here, but having not

the benevolent considerations which pleaded in vain for a continuance of the peace, may have their due effect in speedily restoring its blessings. Until this happy change shall take place the French Government may be assured that the United States will forget none of the obligations which the laws of neutrality impose on them. Faithful to their character they will pay to every belligerent right the respect which is due to it; but this duty will be performed in the confidence that the rights of the United States will be equally respected. The French Government will do justice to the frankness of this declaration, which is rendered the more proper, by the irregularities, of which too many examples have been heretofore experienced. The President does not permit himself to doubt that the French Government, consulting equally its own honor and the true interests of France, will guard by effectual regulations against every abuse under colour of its authority, whether on the high seas, or within French or foreign jurisdiction, which might disturb the commerce or endanger the friendly relations so happily subsisting, and

yet called on me I have had no opportunity of paying him civilities or obtaining explanations from him. I wait anxiously for your next. Your last was of Aug. 15. I hope you have been favorably rec$^{d}$, and will bring the British Gov$^{t}$ more & more to understand their own interests as well as our rights. Insist on instructions to *all* their naval officers, to abstain from impressions & to respect our jurisdictional rights. Incidents are daily occurring which otherwise may overcome the calculating policy of the Present Executive, & provoke the public temper into an irresistible impetus on the public Councils. M$^{r}$ K. says that if he c$^{d}$ have remained a little longer, the British Gov$^{t}$ might possibly have been brought into a contract guarding ag$^{st}$ this evil; but that the business is to be effected at that Court by the U. S. not so well by formal notes & official discussions as by the frankness & familiarity of explanatory & expostulatory observations in private discourse. I give you this in confidence, as a hint that may be useful. Mr. Purveyance had seized your wishes before I returned hither, & I did not know till this moment that he had not sailed. I write in great haste to secure the present mail, which is the only one that promises a conveyance by him. He will give you much public & all private information.—*Mad. MSS.*

which the United States are so much disposed to cherish, between the two nations.

Your interposition against the arrette of the 1st Messidor an 11 was due to the just interests of your fellow citizens. It is to be hoped that the strong views which you have presented of the subject, will lead the French Government to retract or remodify a measure not less unjust than injurious to the interests of France. Regulations which by their suddenness, ensnare those who could not possibly know them, and who meant to observe those naturally supposed to be in force, are to all intents retrospective, having the same effect and violating the same privileges, as laws enacted subsequent to the cases to which they are applied. The necessity of leaving between the date and the operation of commercial regulations, an interval sufficient to prevent surprize on distant adventurers, is in general too little regarded, and so far there may be room for common complaint. But when great and sudden changes are made, and above all, when legal forfeitures as well as mercantile losses are sustained, redress may fairly be claimed by the innocent sufferers. Admitting the public safety, which rarely happens, to require regulations of this sort, and the right of every Government to judge for itself, of the occasions, it is still more reasonable that the losses should be repaired than that they should fall on the individuals innocently ensnared.

Your suggestion as to commercial arrangements of a general nature with France, at the present juncture has received the attention of the President; but he has not decided that any instructions should be given you to institute negotiations for that purpose; especially as it is not known on what particular points sufficiently advantageous to the United States, the French Government would be likely to enter into stipulations. Some obscurity still hangs on the extra duty exacted by the Batavian Government. The state of our information leaves it doubtful, whether the interests of the United States will be promoted, by the change authorized by our Treaty with that Republic.

Mr. Pinckney will doubtless have communicated to you his conversation with Mr. Cevallos, in which the latter denied the right of France to alienate Louisiana, to the United States; alleging a secret stipulation by France not to alienate. Two notes on the same subject have lately been presented here by the Marquis D'Yrujo. In the first dated Sept. 4 he enters a caveat against the right of France to alienate Louisiana, founding it on a declaration of the French Ambassador at Madrid in July 1802 that France would never part with that Territory, and affirming that on no other condition Spain would have ceded it to France. In the second note dated Sept. 27, it is urged as an additional objection to the Treaty between the United States and France, that the French Government had never completed the title of France, having failed to procure the stipulated recognition of the King of Etruria from Russia and Great Britain which was a condition on which Spain agreed to cede the Country to France. Copies of these Notes of the Spanish Minister here, with my answer, as also extracts from Mr. Pinckney's letter to me, and from a note of the Spanish Minister at Madrid to him, are alsc enclosed.

From this proceeding on the part of Spain, as well as by accounts from Paris, it is not doubted that whatever her views may be in opposing our acquisition of Louisiana, she is soliciting the concurrence of the French Government. The interest alone which France manifestly has in giving effect to her engagement with the United States, seems to forbid apprehensions that she will listen to any entreaties or temptations which Spain may employ. As to Spain it can hardly be conceived that she will unsupported by France, persist in her remonstrances, much less that she will resist the Cession to the United States, by force.

The objections to the Cession, advanced by Spain, are in fact too futile to weigh either with others or with herself The promise made by the French Ambassador, that no alienation should be made, formed no part of the Treaty of retrocession to France; and if it had, could have no effect on the

purchase by the United States, which was made in good faith, without notice from Spain of any such condition, and even with sufficient evidence that no such condition existed. The objection drawn from the failure of the French Government to procure from other powers an acknowledgment of the King of Etruria, is equally groundless. This stipulation was never communicated either to the public, or to the United States, and could therefore be no bar to the contract made by them. It might be added that as the acknowledgment stipulated was, according to the words of the Article, to precede possession by the King of Etruria the overt possession by him was notice to the world that the conditions on which it depended had either been fulfilled or been waved. Finally, no particular powers, whose acknowledgment was to be procured, are named in the article; and the existence of war between Great Britain and France at the time of the stipulation, is a proof that the British acknowledgment, the want of which is now alleged as a breach of the Treaty, could never have been in its contemplation.

But the conduct of the Spanish Government, both towards the United States and France, is a complete answer to every possible objection to the Treaty between them. That Government well knew the wish of the United States to acquire certain territories which it had ceded to France, and that they were in negotiation with France on the subject; yet the slightest hint was never given that France had no right to alienate, or even that an alienation to the United States would be disagreeable to Spain. On the contrary the Minister of his Catholic Majesty, in an official note bearing date May 4 last, gave information to the Minister of the United States at Madrid, that the "entire province of Louisiana, with the limits it had when held by France, was retroceded to that power, and that the United States might address themselves to the French Government in order to negotiate the acquisition of the territories which would suit their interest." Here is at once a formal and irrevocable recognition of the right as well of France to convey as of the

United States to receive the Territory, which is the subject of the Treaty between them. More than this cannot be required to silence forever the cavils of Spain at the titles of France now vested in the United States; yet for more than this, she may be referred to her own measures at New Orleans preparatory to the delivery of possession to France; to the promulgation under Spanish authority at that place, that Louisiana was retroceded and to be delivered to France; and to the orders signed by His Catholic Majesty's own hand, now ready to be presented to the Government of Louisiana for the delivery of the Province to the person duly authorized by France to receive it.

In a word, the Spanish Government has interposed two objections only to the title conveyed to the United States by France. It is said first, that the title in the United States, is not good, because France was bound not to alienate. To this it is answered, that the Spanish Government itself referred the United States to France, as the power capable and the only power capable, of conveying the territory in question. It is said next that the title in France herself was not good. To this, if the same answer were less decisive the orders of the King of Spain for putting France into possession, are an an swer which admits of no reply.

The President has thought proper that this view of the case should be transmitted to you, not doubting that you will make the proper use of it with the French Government, nor that that Government will feel the full force of its stipulated obligations to remove whatever difficulties Spain may interpose towards embarrassing a transaction, the complete fulfilment of which is as essential to the honor of France, as it is important to the interests of both Nations. In the mean time we shall proceed in the arrangements for taking possession of the Country ceded, as soon as possession shall be authorized; and it may be presumed that the provisions depending on Congress, will be sufficient to meet the discontents of Spain in whatever form they may assume.

The United States have obtained, by just and honorable

means, a clear title to a territory too valuable in itself and too important to their tranquility and security not to be effectually maintained, and they count on every positive concurrence on the part of the French Government which the occasion may demand from their friendship and their good faith.

The rightful limits of Louisiana are under investigation. It seems undeniable from the resent state of the evidence that it extends Eastwardly as far as the river Perdido, and there is little doubt that we shall make good both a western and northern extent highly satisfactory to us.

The considerations which led Mr. Monroe to decline his trip to Madrid, having the same weight with the President, the mission is suspended until other instructions shall be given, or until circumstances shall strongly invite negotiations at Madrid for completing the acquisition desired by the United States.

The American citizens detained at Jacmel have been restored to their liberty and returned to the United States as you will find by a letter from one of them, of which a copy is inclosed.

Permit me to request your particular attention to the inclosed communication from the Secretary of the Treasury, respecting a balance due from Mr. Joseph Miller to the United States. Should there be danger of his assigning the award, so as to require the Bills to be issued by you in the name of another person it will deserve your consideration how far it is practicable to have recourse to the authority competent to give the award, that they may modify the terms of it in such manner as to secure the public claim. If no such danger exists and Mr. Miller is yet unwilling to enter into a proper arrangement, it seems best that the sett off claimed by the United States should be endorsed by you upon the Bills previously to their delivery, in order to prevent a transfer without notice.

With great respect & consideration &c. &c.,

P. S. October 14 Since the above was written, I have

received a third Note from the Marquis D'Yrujo, in reply to my answer to his two preceding. A copy of it is herewith added. It requires no comment beyond what may be applicable in the above observations on his two first notes; being probably intended for little more than a proof of fidelity to his trust, and of a zeal recommending him to the favor of his Sovereign.

Be pleased to cause the books referred to in the inclosed slip from the Moniteur of the 29th of July last to be purchased and transmitted to this office. They may doubtless be had at Paris or Amsterdam. You may add to them any other reputable and valuable treatise and also collection of modern treaties you think proper.

It having been thought proper to communicate to Mr. Pichon the French charge D'Affairs here, the tenor of the Notes from the Marquis D'Yrujo, he has presented in a note just received, a vindication of his Government and its treaty with the United States against the objections proceeding from the Spanish Government. A copy of this note is herewith inclosed.

## TO CHARLES PINCKNEY.

D. OF S. MSS. INSTR.

DEPARTMENT OF STATE October 12th—1803.

SIR,

Since my last of July 29, I have received your several letters of April 12 & 20 May 2d & 4th June 12 and July 18th.

Mr. Monroe has already informed you of his having proceeded to London, and of his intention not to repair to Madrid, for the present. He will have since received instructions given on a contrary supposition; but it is probable he will wait where he is for the determination of the President on the reasons which kept him from proceeding to Madrid. I have just informed him that the President approves the course he has taken, so that he is not to be expected to join you at Madrid, until he shall be so instructed, or until a change of circumstances, shall in his view clearly invite him to do so. My

last letter to you having provided for the case of Mr. Monroe's postponing this trip, I need not repeat the instructions and observations then made to you. I shall only add, that it is more proper now than ever that you should not be in haste without the concurrence of your colleague, to revive the negotiation jointly committed to you.

Among the reasons which weighed with the President as well as with Mr. Monroe, against attempting at present, to procure from the Spanish Government the residuum of territory desired by the United States, is the ill humour shewn by that Government at the acquisition already made by them from France; and of which the language held to you by M. Cevallos as communicated in your letter of is a sufficient proof. A still fuller proof of the same fact, is contained in three letters lately received from the Spanish Minister here, copies of which with my answer to the two first, are herewith inclosed. I inclose also a copy of a letter written on the occasion to Mr. Livingston, which was rendered more proper, by the probability as well as by information from Paris, that efforts would be used with Spain to draw the French Government into her views of frustrating the Cession of Louisiana to the United States.

In these documents you will find the remarks by which the objections made by the Spanish Government to the Treaty of Cession between the U. S. and France are to be combated. The President thinks it proper that they should without delay be conveyed to the Spanish Government, either by a note from you, or in conversation, as you may deem most expedient; and in a form and stile best uniting the advantages of making that Government sensible of the absolute determination of the United States to maintain their right, with the propriety of avoiding undignified menace, and unnecessary irritation.

The conduct of Spain on this occasion is such as was in several views little to be expected, and as is not readily explained. If her object be to extort Louisiana from France as well as to prevent its transfer to the U States it would seem

that she must be emboldened by an understanding with some other very powerful quarter of Europe. If she hopes to prevail on France to break her engagement to the United States, and voluntarily restore Louisiana to herself, why has she so absurdly blended with the project the offensive communication of the perfidy which she charges on the First Consul? If it be her aim to prevent the execution of the Treaty between the United States and France, in order to have for her neighbor the latter instead of the United States, it is not difficult to shew that she mistakes the lesser for the greater danger, against which she wishes to provide. Admitting as she may possibly suppose, that Louisiana as a French Colony, would be less able as well as less disposed than the United States, to encroach on her Southern possessions, and that it would be too much occupied with its own safety against the United States, to turn its force on the other side against her possessions, still it is obvious, in the first place, that in proportion to [as] the want of power in the French Colony would be safe for Spain, compared with the power of the United States, the Colony would be insufficient as a barrier against the United States; and in the next place, that the very security which she provides would itself be a source of the greatest of all dangers she has to apprehend. The Collisions between the United States and the French would lead to a contest in which Great Britain would naturally join the former, and in which Spain would of course be on the side of the latter; and what becomes of Louisiana and the Spanish possessions beyond it, in a contest between powers so marshalled? An easy and certain victim to the fleets of Great Britain and the land armies of this Country. A combination of these forces was always and justly dreaded by both Spain and France. It was the danger which led both into our revolutionary war, and [as] much inconsistency as weakness is chargeable on the projects of either, which tend to reunite for the purposes of war, the power which has been divided. France returning to her original policy, has wisely by her late Treaty with the United States, obviated a danger which could not have been very

remote. Spain will be equally wise in following the example and by acquiescing in an arrangement which guards against an early danger of controversy between the United States, first with France then with herself, and removes to a distant day the approximation of the American and Spanish settlements, provide in the best possible manner for the security of the latter and for a lasting harmony with the United States. What is it that Spain dreads? She dreads, it is presumed, the growing power of this country, and the direction of it against her possessions within its reach. Can she annihilate this power? No.—Can she sensibly retard its growth? No.—Does not common prudence then advise her, to conciliate by every proof of friendship and confidence the good will of a nation whose power is formidable to her; instead of yielding to the impulses of jealousy, and adopting obnoxious precautions, which can have no other effect than to bring on prematurely the whole weight of the Calamity which she fears. Reflections, such as these may perhaps enter with some advantage into your communications with the Spanish Government, and as far as they may be invited by favorable occasions, you will make that use of them.

Perhaps after all this interposition of Spain it may be intended merely to embarrass a measure which she does not hope to defeat, in order to obtain from France or the United States or both, concessions of some sort or other as the price of her acquiescence. As yet no indication is given, that a resistance by force to the execution of the Treaty is prepared or meditated. And if it should, the provisions depending on Congress, whose Session will commence in two days, will, it may be presumed, be effectually adapted to such an event.

With sentiments of great esteem and consideration &c &c.

P. S. Mr. Graham has signified his wish to resign the place he holds at Madrid. The President leaves it to himself to fix the time when it may be most convenient that the resignation should take effect. Whenever this shall arrive, you have the permission of the president to name a private Secretary.

## TO ROBERT R. LIVINGSTON.[1]

D. OF S. MSS. INSTR.

DEPARTMENT OF STATE, November 9th 1803.

SIR,

In my letter of the 22 ult. I mentioned to you that the exchange of the ratifications of the Treaty and Conventions with France had taken place here, unclogged with any condition or reserve. Congress have since passed an act to enable the President to take possession of the ceded territory and to establish a temporary Government therein. Other Acts have been passed for complying with the pecuniary stipulations of those instruments. The Newspapers inclosed will inform you of these proceedings.

By the post which left this City for Nachez on Monday last,

[1] TO BARBÉ MARBOIS.

DEPT OF STATE.

Novr 4 1803.

SIR I rec[d] your favor of the 21 prairial, with a pleasure which is redoubled by the consideration that I am able in acknowledging it, to inform you [of the formal approbation of the late Treaty & con[n] by every branch of our Gov[t] The event establishes, I hope forever, perfect harmony between the two Countries. It is the more likely to do so, as it is founded in a policy, coeval with their political relations, of removing as much as possible all sources of jealousy & collision. The frankness & uprightness which marked the progress of this transaction, are truly honorable to all concerned in it; and it is an agreeable circumstance, that, in the exchange of ratifications, it was closed in the same spirit of mutual confidence, M[r.] Pichon inferring, doubtless with the truest reason, that an unqualified exchange, under actual circumstances, would best accord with the real views of his Government.

It remains now to compleat the work by an honest execution of the mutual stipulations. On our part the sequel will certainly correspond with the good faith & prompt arrangements thus far pursued; and full reliance is placed on the reciprocal disposition of your Gov[t] of which so many proofs have been seen.

The interposition of Spain, is an incident not more unexpected, than it is unreasonable. It is to be wished, that it may terminate without any serious consequences, even to herself. Whatever turn it may take, the honour of the French Gov[t] guaranties the object at which our measures are pointed; & the interest of France will equally lie in making the fruits of these measures, hers, as well as ours.

a joint and several Commission was forwarded to Governor Claiborne and Genl Wilkinson authorizing them to receive possession and occupy those territories, and a separate Commission to the former as temporary Governor. The possibility suggested by recent circumstances that delivery may be refused at New Orleans, on the part of Spain, required that provision should be made as well for taking as receiving possession. Should force be necessary, Governor Claibone and Genl Wilkinson will have to decide on the practicability of a Coup de Main, without waiting for the reinforcements which will require time on our part and admit of prep-

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I partake Sir in all the satisfaction which you feel at an event which awakens recollections both of a public & private nature, so agreeable to both of us; and I pray you to be assured that I observe with sincere pleasure, in the share you have contributed to it, those enlarged views and honorable principles, which confirm the high esteem & distinguished consideration with which I remain, Dr sir, your friend & Servt —*Mad. MSS.*

TO JAMES MONROE.

Washington. Decr 26 1803

Dear Sir I have recd I believe all your letters public and private down to that of October 22, written merely to say that all continued well. I have taken due care of the communications on the subject of your ———. Everything seems to be well understood on this side the water. I cannot say more now as I write of necessity without cypher.

M. Merry has been with us some time. He appears to be an amiable man in private society, and a candid and agreeable one in public business. A foolish circumstance of etiquette has created some sensibility in Mrs Merry and perhaps himself; but they will find so uniform & sincere a disposition in all connected with the Govt to cultivate a cordial society with them, and to manifest every proper respect for their characters and station, that if any unfavorable impression has happened, it must be very transient. It would be unfortunate if it were otherwise, because a dissatisfaction of whatever sort, or however produced, might mingle itself with his general feelings, and, thro' them, with the agency committed to him.

We have had several conversations both incidental & formal on the topics most interesting to the two Countries. I have taken pains to

arations on the other. The force provided for this object is to consist of the regular troops near at hand, as many of the Militia as may be requisite and can be drawn from the Mississippi Territory, and as many volunteers from any Quarter as can be picked up. To them will be added 500 mounted Militia, from Tennessee, who it is expected will proceed to Nachez with the least possible delay.

Mr. Pichon has in the strongest manner pressed on Mr. Laussat the French Commissary appointed to deliver possession, the necessity of co-operating in these measures of com-

make him sensible of the tendency of certain proceedings on the British side, and of their injustice as well as impolicy. I communicated to him a few days ago, the intention of the President to explain our views fully to you on these topics, and to authorize you to negociate such conventional eclaircissements and arrangements as may put an end to every danger to which the harmony between the two Countries is now subjected. His ideas appeared to be moderate, & his disposition conciliatory. As he will doubtless communicate to his Gov^t. what passed us, I think it proper, in order to place you on a level of information, to observe briefly, that the plan will be to get rid of impressments altogether on the high seas, to define blockades & contraband according to the last Treaty between G. B. & Russia, to regulate visits & searches of our vessels, according to the Treaty of 1786 between G. B. and France, to put aside the doctrine, that a Colonial trade, not allowed in time of peace, is unlawful in time of war; and in return to agree to a mutual surrender of deserters from ships and from garrisons, and to a legislative provision ag^t exporting articles enumerated as contraband to places within the jurisdiction of an enemy. This will be the outline, excepting a few minor propositions. The subject is now before the Cabinet, and it will not be long before it will be forwarded to you in its details. It is much to be desired that something may be done to consolidate the good understanding between the two nations, and I really believe that there is nothing aimed at by us that is not for the true interest of both parties. I am not without hopes that M^r Merry sees the business in a good degree in the same light, and that his representations will co-operate with your reasonings on it. I am glad to learn that in Europe violations of our maritime rights are so much mitigated in comparison with the former war. It is a good omen. In the American seas, however the scene is very different, and I fear is growing worse & worse. Impressments and other outrages on our flag are multiplying, and the depredations, under pretext of blockades, are going on in rivalship with all the extrav-

pulsion should they prove necessary by the refusal of the Spanish Officers to comply without them.

On the 8th of October it was not known, and no indications had been exhibited at New Orleans, of a design on the part of Spain to refuse or oppose the surrender of the Province to France, and thereby to us.[1]

With high respect & consideration &c.

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agances of the last war. I will send herewith if I can, certain documents, both as to impressments and blockades which will explain the justice of these remarks, and satisfy you, as they ought to do the British Govt. that the friendship & patience of this country are put to a severe trial. A Bill has been brought in Congress with a view to some remedy. It proposes to forbid the use of our pilots, our ports, and our supplies & hospitalities to any ship of war which shall be proved & proclaimed to have impressed or otherwise insulted those on board our vessels. Whether it will be pursued into a law is uncertain; but if it should not, the forbearance will proceed merely from a hope that a remedy to the evil is contemplated by negotiations. The public mind is rising to a state of high sensibility, and no other consideration than such a hope would I am persuaded, suspend the effect of it on the Legislative Councils. It is to be wished that the introduction of the Bill may not be misconstrued into an unfriendly disposition towards G. Britain. I have every reason to believe that the supposed necessity of it is deeply regretted, and that a just accommodation of all differences with G. B. will give the most sincere and general satisfaction. Louisiana was delivered by the Spanish authorities at N. Orleans to Laussat, on the 30th of Novr. Our Comssrs, Claibourne & Wilkinson with their troops, were at Fort Adams on their way to receive the transfer to the U. States All difficulties therefore are at an end in that quarter. Nothing appears to have passed in relation to W. Florida, or the boundaries in general. It is understood that Spain does not include any territory E. of the Misspi except the island of N. O. in the idea of Louisiana. It will be an easy matter to take possession according to our idea. The mode alone can beget a question.

You omitted the bill of the Paris Silver Smith, referred to in your last.—Yrs *Monroe MSS.*

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[1] A copy of the above letter was also forwarded to Pinckney, excepting the postscript. *Note in the original.* The postscript related to the appointment of commissioners to liquidate claims under the convention of April 30, 1803.

TO JAMES MONROE.

D. OF S. MSS. INSTR.

DEPARTMENT OF STATE, January 5, 1804.[1]

SIR,

The information and observations which you have as yet received from me since your arrival in London, on the impressment of our seamen, and other violations of our rights, have been in private letters only. The delay in making these injuries the subject of official communications, proceeded, first, from an expectation that the British Government would have notified formally to the United States as a neutral power, the state of War between Great Britain and France; which would have been an apt occasion, for combining with assurances of the fairness with which our neutral obligations would be fulfilled, our just claims on a correspondent respect for our neutral rights, and particularly of those which had been least respected during the last war: secondly, from the expected arrival of Mr. Merry, which, if he should not be charged with such a notification, might be a favorable opportunity for commencing the explanations and discussions which must precede a thorough correction of the wrongs which we experience.

[1] Madison wrote to Monroe privately, January 18th.—

I write you by Mr. Baring, who will also take charge of full instructions on the subject of a Convention with G. B. for putting an end to impressments &c. It is of great importance to the harmony of the two Countries that the project should not entirely fail. There is not time to forward by this opportunity instructions relative to Madrid. They will probably soon follow. In the mean time, you will collect from a letter which the President writes his present views with respect to that Mission. I refer to the same source also for other things of which a repetition is unnecessary, particularly the arrangement as to Louisiana. . . .

The inclosed paper has an address to M^r. Merry, which shows the importance to G. Britain of a stipulation to surrender her deserting seamen. She cannot expect this to be either stipulated or practised, whilst impressments go on. On the contrary she must expect other States to follow the example of V^a. which will throw the whole trade between the two Countries in time of war at least into American vessels. —*Mad. MSS.*

Since the arrival of Mr. Merry, accordingly, no time has been lost in calling his attention to the subject; and in preparing both it and him, for the negotiation which is now to be committed to you. If appearances are to be trusted, his impressions and representations will be friendly to it. In my conversations with him, which have been free and full, he has expressed the best dispositions, has listened with candor to the appeals made as well to the considerations of justice, as of the solid interest of his nation; and altho' he suggests serious difficulties on certain points, he will, I believe, sincerely co-operate in lessening them, and in bringing about an arrangement which will be acceptable to this country. The only topic on which any thing has passed in writing between the Department of State and him, is that of the pretended blockade of St. Domingo. Copies of my letter to him and of his answer, are herewith inclosed; as also of the letter written to Mr. Thornton some time before, and referred to in that to Mr. Merry, in relation to a like blockade of Martinique and Guadaloupe.

Altho' there are many important objects which may be thought to invite conventional regulations between the United States and Great Britain, it is evidently proper to leave for subsequent consideration, such as are less urgent in their nature or more difficult in their adjustment; and thereby to render the way plainer and shorter to an agreement with respect to objects which cannot be much longer delayed without danger to the good understanding of the two nations. With this view the plan of a Convention contemplated by the President, is limited to the cases of impressments of our seamen, of blockades, of visiting and searching our vessels, of contraband of War, and of the trade of hostile Colonies, with a few other cases affecting our maritime rights; embracing however, as inducements to Great Britain to do us justice therein, a provision for the surrender of deserting seamen and soldiers, and for the prevention of contraband supplies to her enemies.

The plan digested for your use is subjoined. The first column contains the articles which are to be proposed in the first instance, and which are considered as within our just expectations: The second modifies the articles into the concessions which the British Government may possibly require, and which it may be expedient for us ultimately to admit.

A Convention between the United States and Great Britain.

| First Proposal. Article I. | Second and Ultimatum. Article I. |
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| No person whatever shall, upon the high seas and without the jurisdiction of either party be demanded or taken out of any ship or vessel belonging to citizens or subjects of one of the other parties, by the public or private armed ships belonging to or in the service of the other, unless such person be at the time in the Military service of an enemy of such other party. | No seaman, seafaring or other person shall upon the high seas and without the jurisdiction of either party be demanded or taken out of any ship or vessel belonging to the citizens or subjects of one of the parties by the public or private armed ships belonging to or in the service of the other party and strict and effectual orders shall be given for the due observance of this engagement: but it is to be understood that this article shall not exempt any person on board the ships of either of the parties from being taken therefrom by the other party in cases where they may be liable to be so taken according to the laws of nations, which liability however shall not be construed to extend in any case |

to seamen or seafaring persons, being actually part of the crew of the vessel in which they may be, nor to persons of any description passing from one port to another port of either of the parties.

Article II.

The same.

Article II.

No person being a subject or citizen of one of the parties and resorting to or residing in the dominions of the other, shall in any case be compelled to serve on board any vessel whether public or private belonging to such other party: and all citizens or subjects whatever of the respective parties at this time compulsively serving on board the vessels of the other shall be forthwith liberated, and enabled by an adequate recompence to return to their own country.

Article III.

The same.

Article III.

If the ships of either of the parties shall be met with sailing either along the coasts or on the high seas by any ship of war or other public or private armed ships of the other party, such ships of war

or other armed vessels shall for avoiding all disorder in visiting and examining the same, remain out of cannon shot, unless the state of the sea or the place of meeting render a nearer approach necessary, and shall in no case compel or require such vessel to send her boat, her papers or any person from on board to the belligerent vessel, but the belligerent vessel may send her own boat to the other and may enter her to the number of two or three men only who may in an orderly manner make the necessary inquiries concerning the vessel and her cargo; and it is agreed that effectual provision shall be made for punishing violations of any part of this article.

Article IV.
The same.

Article IV.

Contraband of war shall consist of the following articles only: Salt petre, sulphur, cuirasses, pikes, swords, sword belts, knapsacks, saddles and bridles, cannons, mortars, fire arms, pistols, bombs, grenades, bullets, fire

locks, flints, matches and gun powder; excepting however the quantity of the said articles which may be necessary for the defence or use of the ship and those who compose the crew, and no other articles whatever not here enumerated shall be reputed contraband or liable to confiscation, but shall pass freely without being subjected to the smallest difficulty unless they be enemy's property, and it is to be particularly understood that under the denomination of enemy's property, is not to be comprized the merchandise of the growth, produce or manufactures of the countries or dominions at war which shall have been acquired by the citizens or subjects of the neutral power, and shall be transported for their account, which merchandise cannot in any case or on any pretext be excepted from the freedom of the neutral flag.

Article V.

The same.

Article V.

In all cases where the prize courts of either party shall pronounce judgment against any vessel or property claimed

by citizens or subjects of the other, the sentence or decree shall mention the reasons or motives in which the same shall have been founded and an authenticated copy of the sentence or decree and of all the proceedings in the case, shall, if demanded be delivered to the commander or Agent of the said vessel, without any delay, he paying the legal fees for the same.

Article VI.
The same.

Article VI.

In order to determine what characterizes a blockaded port, that denomination is given only to a port where there is by the disposition of the power which attacks it with ships stationary or sufficiently near an evident danger of entering.

Article VII.
Omit the preamble.

Article VII.

(In consideration of the distance of the ports likely to be blockaded by either party from the ports of the other party and of other circumstances incident to their relative situations), it is agreed that no vessel sailing from the ports of either shall, altho' cleared or bound to a block-

aded port be considered as violating in any manner the blockade, unless on her approach towards such port she shall have been previously warned against entering the same.

Article VIII.

Omit, "captains, officers."

Article VIII.

It is agreed that no refuge or protection shall be afforded by either party to the "captains, officers," mariners, sailors or other persons not found to be its own citizens or subjects who shall desert from a vessel of the other party, of the crew whereof the deserter made a part, but on the contrary all such deserters shall be delivered up on demand to the commanders of the vessels from which they shall have deserted, or to the commanding officers of the ships of war of the respective nations, or to such other persons as may be duly authorized to make requisition in that behalf; provided that proof be made within two years from the time of desertion by an exhibition of the ships papers or authenticated copies thereof, and by satisfactory evidence of the identity of the person, that the deserters so

demanded were actually part of the crew of the vessels in question.

And for the more effectual execution of this article adequate provision shall be made for causing to be arrested on the application of the respective consuls or vice consuls to the competent authorities all deserters as aforesaid, duly proved to be such in order that they may be sent back to the commanders of the vessels to which they belonged or removed out of the country and all due aid and assistance shall be given in searching for as well as in seizing and arresting the said deserters who shall even be detained and kept in the prisons of the country at the request and expence of the said consuls or vice consuls until they shall have found an opportunity of sending them back or removing them as aforesaid. But if they be not so sent back or removed within three months from the day of their arrest they shall be set at liberty and shall not again be arrested for the same cause.

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| Article IX. | Article IX. |
| Omit "officers or." | It is further agreed that no refuge or protection shall be afforded by either of the parties to any officers or soldiers not found to be its own citizens or subjects who shall desert from the military service of the other; but that on the contrary effectual measures shall be taken in like manner and under like regulations and conditions as with respect to sailors, for apprehending any such deserting soldiers and delivering them to the commanding officers of the military posts, forts or garrisons from which they shall have deserted, or to the consuls or vice consuls on either side or to such persons as may be duly authorized to demand their restitution. |
| Article X. | Article X. |
| Omitted. | It is however understood that no stipulation herein made shall be construed to empower the civil or military officers of either of the parties to enter forcibly into any of the forts, garrisons posts or other places or to use violence of any sort within the juris- |

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| | diction of the other party or be construed in any manner to contravene or derogate from the stipulation contained in the first of the above articles against demanding or taking any persons out of vessels on the high seas and without the jurisdiction of either of the parties. |
| Article XI. | Article XI. |
| The same. | Each party will prohibit its citizens or subjects from clandestinely carrying away from the territories or dominions of the other, any seamen or soldiers belonging to such other party. |
| Article XII. | Article XII. |
| The same. | Neither party shall permit any of the articles above enumerated as contraband of War to be cleared out from its ports to any place within the jurisdiction of an enemy of the other party and in order to enforce this regulation due proof and security shall be given that all such articles of contraband as may be exported from the ports of either of the parties have been actually destined else- |

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| | where than within the jurisdiction of an enemy of the other party. |
| Article XIII.<br>The same. | Article XIII.<br>This Convention shall be in force for the term of five years from the date of the exchange of ratifications. It shall be ratified on both sides within months from the day of its signiture or sooner if possible, and the ratifications exchanged without delay in the United States at the City of Washington. |

*Observations on the preceding plan.*

The first article relates to impressments from American vessels on the high seas. The Commanders of British armed vessels, have as is well known, been long in this practice. They have indeed not only continued it, under the sanction of their superiors, on the high seas; but have, with impunity, extended it to our own coasts, to neutral ports, and to neutral territory; and, in some instances to our own harbours. The article does not comprehend these latter cases, because it would not be very honorable in Great Britain to stipulate against the practice of such enormities, nor in the United States to recur to stipulations as a security against it; and because it may be presumed that such particular enormities will not be repeated or unpunished after a general stop shall have been put to impressments.

The article in its first form renounces the claim to take from the vessels of the neutral party, on the high seas any person whatever not in the military service of an enemy; an exception which we admit to come within the law of nations, on the subject of contraband of war.

With this exception, we consider a neutral flag on the high seas as a safeguard to those sailing under it. Great Britain on the contrary asserts a right to search for and seize her own subjects; and under that cover, as cannot but happen, are often seized and taken off, citizens of the United States and citizens or subjects of other neutral countries, navigating the high seas, under the protection of the American flag.

Were the right of Great Britain in this case not denied the abuses flowing from it, would justify the United States in claiming and expecting a discontinuance of its exercise. But the right is denied and on the best grounds.

Altho' Great Britain has not yet adopted in the same latitude with most other nations, the immunities of a neutral flag, she will not deny the general freedom of the high seas, and of neutral vessels navigating them, with such exceptions only as are annexed to it by the law of nations. She must produce then such an exception in the law of nations in favor of the right she contends for. But in what written and received authority will she find it? In what usage except her own will it be found? She will find in both, that a neutral vessel does not protect certain objects denominated contraband of war, including enemies serving in the war, nor articles going into a blockaded port, nor as she has maintained, and as we have not contested, enemy's property of any kind. But no where will she find an exception to this freedom of the seas, and of neutral flags which justifies the taking away of any person not an enemy in military service, found on board a neutral vessel.

If treaties, British as well as others, are to be consulted on this subject, it will equally appear, that no countenance to the practice can be found in them. Whilst they admit a contraband of war, by enumerating its articles, and the effect of a real blockade by defining it, in no instance do they affirm or imply a right in any sovereign to enforce his claims to the allegiance of his subjects, on board neutral vessels on the high seas. On the contrary, whenever a belligerent claim against persons on board a neutral vessel, is referred to in

treaties, enemies in military service alone are excepted from the general immunity of persons in that situation; and this exception confirms the immunity of those who are not included in it.

It is not then from the law or the usage of nations, nor from the tenor of treaties, that any sanction can be derived for the practice in question. And surely it will not be pretended that the sovereignty of any nation extends in any case whatever, beyond its own dominions, and its own vessels on the high seas. Such a doctrine would give just alarm to all nations, and more than any thing would countenance the imputation of aspiring to an universal empire of the seas. It would be the less admissible too, as it would be applicable to times of peace as well as to times of war, and to property as well as to persons. If the law of allegiance, which is a municipal law, be in force at all on the high seas, on board foreign vessels, it must be so at all times there, as it is within its acknowledged sphere. If the reason alleged for it be good in time of war, namely that the sovereign has then a right to the service of all his subjects, it must be good at all times, because at all times he has the same right to their service. War is not the only occasion for which he may want their services, nor is external danger the only danger against which their services may be required for his security. Again;—if the authority of a municipal law can operate on persons in foreign vessels on the high seas, because within the dominion of their sovereign they would be subject to that law, and are violating that law by being in that situation, how reject the inference that the authority of a municipal law may equally be enforced on board foreign vessels on the high seas, against articles of property exported in violation of such a law, or belonging to the country from which it was exported? And thus every commercial regulation in time of peace too, as well as of war, would be made obligatory on foreigners and their vessels, not only whilst within the dominion of the sovereign making the regulation, but in every sea, and at every distance where an armed

vessel might meet with them. Another inference deserves attention. If the subjects of one sovereign may be taken by force from the vessels of another, on the high seas, the right of taking them when found implies the right of searching for them, a vexation of commerce, especially in time of peace, which has not yet been attempted, and which for that as well as other reasons, may be regarded as contradicting the principle from which it would flow.

Taking reason and justice for the tests of this practice, it is peculiarly indefensible; because it deprives the dearest rights of persons, of a regular trial, to which the most inconsiderable article of property captured on the high seas, is entitled; and leaves their destiny to the will of an officer, sometimes cruel, often ignorant, and generally interested by his want of mariners, in his own decisions. Whenever property found in a neutral vessel is supposed to be liable on any grounds to capture and condemnation, the rule in all cases is that the question shall not be decided by the captor, but be carried before a legal tribunal, where a regular trial may be had, and where the captor himself is liable to damages, for an abuse of his power. Can it be reasonable then or just, that a belligerent commander who is thus restricted and thus responsible in a case of mere property of trivial amount, should be permitted without recurring to any tribunal whatever to examine the crew of a neutral vessel, to decide the important question of their respective allegiances, and to carry that decision into instant execution, by forcing every individual he may chuse, into a service abhorent to his feelings, cutting him off from his most tender connections, exposing his mind and his person to the most humiliating discipline, and his life itself to the greatest dangers? Reason, justice and humanity unite in protesting against so extravagant a proceeding. And what is the pretext for it? It is that the similarity of language and of features between American citizens and British subjects are such as not easily to be distinguished; and that without this arbitrary and summary

authority to make the distinction British subjects would escape, under the name of American citizens from the duty which they owe to their sovereign. Is then the difficulty of distinguishing a mariner of one country from the mariner of the other, and the importance of his services a good plea for referring the question whether he belongs to the one or to the other to an arbitrary decision on the spot, by an interested and irresponsible officer? In all other cases, the difficulty and the importance of questions, are considered as reasons for requiring greater care and formality in investigating them, and greater security for a right decision on them. To say that precautions of this sort are incompatible with the object, is to admit that the object is unjustifiable; since the only means by which it can be pursued are such as cannot be justified. The evil takes a deeper die when viewed in its practice as well as its principles. Were it allowable that British subjects should be taken out of American vessels on the high seas, it might at least be required that the proof of their allegiance should lie on the British side. This obvious and just rule is however reversed; and every seaman on board, tho' going from an American port, and sailing under the American flag, and sometimes even speaking an idiom proving him not to be a British subject, is presumed to be such, unless shewn to be an American citizen. It may safely be affirmed that this is an outrage and an indignity which has no precedent, and which Great Britain would be among the last nations in the world to suffer if offered to her own subjects, and her own flag. Nor is it always against the right presumption alone, which is in favor of the citizenship corresponding with the flag, that the violence is committed. Not unfrequently it takes place in defiance of the most positive proof, certified in due form by an American officer. Let it not be said that in granting to American seamen this protection for their rights as such, the point is yielded, that the proof lies on the American side, and that the want of it in the prescribed form justifies the inference that the seaman is

not of American allegiance. It is distinctly to be understood, that the certificate usually called a protection to American seamen, is not meant to protect them under their own or even any other neutral flag on the high seas. We maintain, and can never admit, that in such a situation any other protection is required for them, than the neutral flag itself, on the high seas. The document is given to prove their real character, in situations to which neither the law of nations nor the law of their own country are applicable; in other words to protect them within the jurisdiction of the British laws, and to secure to them, within every other jurisdiction, the rights and immunities due to them. If in the course of their navigation even on the high seas, the document should have the effect of repelling wrongs of any sort, it is an incidental advantage only of which they avail themselves, and is by no means to be misconstrued into a right to exact such a proof, or to make any disadvantageous inference from the want of it.

Were it even admitted that certificates for protection might be justly required in time of war, from American seamen, they could only be required in cases, where the lapse of time from its commencement had given an opportunity for the American seamen to provide themselves with such a document. Yet it is certain that in a variety of instances seamen have been impressed from American vessels, on the plea that they had not this proof of citizenship when the dates and places of the impressments, demonstrated the impossibility of their knowing, in time to provide the proof, that a state of war had rendered it necessary.

Whether therefore, we consult the law of nations, the tenor of treaties, or the dictates of reason and justice, no warrant, no pretext can be found for the British practice of making impressments from American vessels on the high seas.

Great Britain has the less to say in excuse for this practice as it is in direct contradiction to the principles on which she proceeds in other cases. Whilst she claims and seizes on the high seas, her own subjects voluntarily serving in American

vessels, she has constantly given, when she could give as a reason for not discharging from her service American citizens, that they had voluntarily engaged in it. Nay, more. Whilst she impresses her own subjects from the American service, altho' they may have been settled and married and even naturalized in the United States, she constantly refuses to release from hers, American citizens impressed into it, whenever she can give for a reason that they were either settled or married within her dominions. Thus, when the voluntary consent of the individual favors her pretensions, she pleads the validity of that consent. When the voluntary consent of the individual stands in the way of her pretensions it goes for nothing! When marriage or residence can be pleaded in her favor, she avails herself of the plea. When marriage & residence and even naturalization are against her, no respect whatever is paid to either! She takes by force her own subjects voluntarily serving in our vessels. She keeps by force American citizens involuntarily serving in hers. More flagrant inconsistencies cannot be imagined.

Notwithstanding the powerful motives which ought to be felt by the British Government to relinquish a practice which exposes it to so many reproaches; it is foreseen that objections of different sorts will be pressed on you. You will be told first, of the great number of British seamen in the American trade and of the necessity for their services in time of war and danger. Secondly—Of the right and the prejudice of the British nation with respect to what are called the British or narrow seas, where its domain would be abandoned by the general stipulation required. Thirdly—Of the use which would be made of such a sanctuary as that of American vessels, for desertions and traitorous communications to her enemies, especially across the channel to France.

1st. With respect to the British seamen serving in our trade it may be remarked, first, that the number tho' considerable, is probably less than may be supposed; secondly, that what is wrong in itself cannot be made right by con-

siderations of expediency or advantage; thirdly, that it is proved by the fact that the number of real British subjects gained by the practice in question, is of inconsiderable importance even in the scale of advantage. The annexed report to Congress on the subject of impressments, with the addition of such cases as may be in the hands of Mr. Erving, will verify the remark in its application to the present war. The statement made by his predecessor during the last war, and which is also annexed, is in the same view still more conclusive. The statement comprehends not only all the applications made by him in the first instance, for the liberation of impressed seamen, between the month of June 1797 and September 1801, but many also which had been made previous to this Agency, by Mr. Pinckney and Mr. King and which it was necessary for him to renew. These applications therefore may fairly be considered as embracing the greater part of the period of the war; and as applications are known to be pretty indiscriminately made, they may further be considered as embracing if not the whole the far greater part of the impressments, those of British subjects as well as others. Yet the result exhibits 2,059 cases only, and of this number, 102 seamen only detained as being British subjects, which is less than 1/20 of the number impressed; and 1142 discharged or ordered to be so, as not being British subjects, which is more than half of the whole number, leaving 805 for further proof, with the strongest presumption that the greater part, if not the whole were American or other aliens, whose proof of citizenship had been lost or destroyed, or whose situation would account for the difficulties and delays in producing it. So that it is certain, that for all the British seamen gained by this violent proceeding, more than an equal number who were not so were the victims; it is highly probable that for every British seaman so gained, a number of others not less than 10 for one must have been the victims, and it is even possible that this number may have exceeded the proportion of twenty to one.

It cannot therefore be doubted that the acquisition of British seamen, by these impressments, whatever may be its advantage, is lost in the wrong done to Americans ignorantly or wilfully mistaken for British subjects; in the jealousy and ill will excited among all maritime nations by an adherence to such a practice; and in the particular provocation to measures of redress on the part of the United States not less disagreeable to them, than embarrassing to Great Britain, and which may threaten the good understanding which ought to be faithfully cultivated by both. The copy of a Bill brought into Congress under the influence of violations committed on our flag, gives force to this latter consideration. Whether it will pass into a law, and at the present session, is more than can yet be said. As there is every reason to believe that it has been proposed with reluctance, it will probably not be pursued into effect, if any hope can be supported of a remedy by an amicable arrangement between the two nations. But such is the feeling thro' this country, produced by the reiterated and atrocious cases of impressments and other insults on our flag, that a remedy of some kind will ere long be called for in a tone not to be disregarded. A copy of the Bill referred to is herewith inclosed.

There is a further consideration which ought to have weight in this question. Altho' the British seamen employed in carrying on American commerce, be in some respects lost to their own nation, yet such is the intimate and extensive connection of this commerce, direct and circuitous, with the commerce, the manufactures, the revenue and the general resources of the British nation, that in other respects its mariners, on board American vessels, may truly be said to be rendering it the most valuable services. It would not be extravagant to make it a question, whether Great Britain would not suffer more by withdrawing her seamen from the merchant vessels of the United States, than her enemies would suffer from the addition of them to the crews of her ships of war and cruizers.

Should any difficulty be started concerning seamen born within the British dominions, and naturalized by the United States since the Treaty of 1783, you may remove it by observing; first that very few if any such naturalizations can take place, the law here requiring a preparatory residence of five years with notice of the intention to become a citizen entered of record two years before the last necessary formality; besides a regular proof of good moral character; conditions little likely to be complied with by ordinary seafaring persons: secondly, that a discontinuance of impressments on the high seas will preclude an actual collision between the interfering claims. Within the jurisdiction of each nation and in their respective vessels on the high seas, each will enforce the allegiance which it claims. In other situations the individuals doubly claimed will be within a jurisdiction independent of both nations.

2d. The British pretensions to domain over the narrow seas are so obsolete, and so indefensible, that they never would have occurred as a probable objection in this case, if they had not actually frustrated an arrangement settled by Mr. King with the British Ministry on the subject of impressments from American vessels on the high seas. At the moment when the articles were expected to be signed an exception of the "narrow seas" was urged and insisted on by Lord St. Vincent; and being utterly inadmissible on our part, the negotiation was abandoned. Mr. King seems to be of opinion however, that with more time than was left him for the experiment, the objection might have been overcome. This is not improbable if the objection was not merely an expedient for evading a relinquishment of a favorite practice.

The objection in itself has certainly not the slightest foundation. The time has been indeed when England not only claimed but exercised pretensions scarcely inferior to full sovereignty over the seas surrounding the British Isles, and even as far as Cape Finisterre to the south and Nanstaten in Norway to the north. It was a time however, when reason

had little share in determining the law and the intercourse of nations, when power alone decided questions of right and when the ignorance and want of concert among other maritime countries facilitated such an usurpation. The progress of civilization and information has produced a change in all those respects; and no principle in the code of public law is at present better established than the common freedom of the seas beyond a very limited distance from the territories washed by them. This distance is not indeed fixed with absolute precision. It is varied in a small degree by written authorities, and perhaps it may be reasonably varied in some degree by local peculiarities. But the greatest distance which would now be listened to any where, would make a small proportion of the narrowest part of the narrowest seas in question.

What are in fact the prerogatives claimed and exercised by Great Britian over these seas? If they were really a part of her domain, her authority would be the same there as within her other domain. Foreign vessels would be subject to all the laws and regulations framed for them, as much as if they were within the harbours or rivers of the country. Nothing of this sort is pretended. Nothing of this sort would be tolerated. The only instances in which these seas are distinguished from other seas, or in which Great Britain enjoys within them, any distinction over other nations, are first, the compliment paid by other flags to hers; secondly the extension of her territorial jurisdiction in certain cases to the distance of four leagues from the coast. The first is a relic of ancient usurpation, which has thus long escaped the correction which modern and more enlightened times have applied to other usurpations. The prerogative has been often contested however, even at the expence of bloody wars, and is still borne with ill will and impatience by her neighbors. At the last treaty of peace at Amiens, the abolition of it was repeatedly and strongly pressed by France; and it is not improbable that at no remote day it will follow the fate of the title of "King of

France" so long worn by the British monarchs and at length so properly sacrificed to the lessons of a magnanimous wisdom. As far as this homage to the British flag has any foundation at present, it rests merely on long usuage and long acquiescence, which are construed, as in a few other cases of maritime claims, into the effect of a general tho' tacit convention. The second instance is the extension of the territorial jurisdiction to four leagues from the shore. This too, as far as the distance may exceed that which is generally allowed, rests on a like foundation, strengthened perhaps, by the local facility of smuggling, and the peculiar interest which Great Britain has in preventing a practice affecting so deeply her whole system of revenue, commerce and manufactures: whilst the limitation itself to four leagues necessarily implies that beyond that distance no territorial jurisdiction is assumed.

But whatever may be the origin or the value of these prerogatives over foreign flags in one case, and within a limited portion of these seas in another, it is obvious that neither of them will be violated by the exemption of American vessels from impressments which are nowise connected with either; having never been made on the pretext either of withholding the wonted homage to the British flag, or of smuggling in defiance of British laws.

This extension of the British law to four leagues from the shore is inferred from an Act of Parliament passed in the year 1736 (9 G. 2. C. 35) the terms of which comprehend all vessels, foreign as well as British. It is possible however, that the former are constructively excepted. Should your enquiries ascertain this to be the case, you will find yourself on better ground, than the concession here made.

With respect to the compliment paid to the British flag, it is also possible that more is here conceded than you may find to be necessary. After the peace of 1783, this compliment was peremptorily withheld by France, in spite of the remonstrances of Great Britain; and it remains for your enquiry, whether it did not continue to be refused, notwithstanding the

failure at Amiens to obtain from Great Britain a formal renunciation of the claim.

From every view of the subject, it is reasonable to expect that the exception of the narrow seas, from the stipulation against impressments, will not be inflexibly maintained. Should it be so, your negotiation will be at an end. The truth is, that so great a proportion of our trade direct and circuitous passes thro' those channels, and such is its peculiar exposure in them to the wrong practised, that with such an exception, any remedy would be very partial. And we can never consent to purchase a partial remedy, by confirming a general evil, and by subjecting ourselves to our own reproaches, as well as to those of other nations.

3d. It appears, as well by a letter from Mr. Thornton, in answer to one from me, of both which copies are inclosed, as from conversations with Mr. Merry that the facility, which would be given, particularly in the British channel, by the immunity claimed for American vessels, to the escape of traitors, and the desertion of others whose services in time of war may be particularly important to an enemy, forms one of the pleas for the British practice of examining American crews, and will be one of the objections to a formal relinquishment of it.

This plea, like all others, admits a solid and satisfactory reply. In the first place, if it could prevail at all against the neutral claim, it would authorize the seizure of the persons described only, and in vessels bound to a hostile country only; whereas the practice of impressing is applied to persons few or any of whom are alleged to be of either description, and to vessels whithersoever bound, even to Great Britain herself. In the next place, it is not only a preference of a smaller object on one side to a greater object on the other; but a sacrifice of right on one side to expediency on the other side.

Considering nevertheless, the possible adherence of the British Government to this last objection, and the extreme

importance to our seafaring citizens and commerce, of a stipulation suppressing a practice flagrant in its nature, and still more so in the abuses inseparable from it, you are left at liberty to concur, if necessary in the modification as it stands in the second column. You will observe that this guards in all cases the crews of our vessels from being meddled with, and in referring, for an exception to the immunity on board our vessels, to the law of nations, yields no principle maintained by the United States; inasmuch as the reference will be satisfied by the acknowledged exception of enemies in military service. Should persons, therefore, other than such, be taken, under pretext of the law of nations, the United States will be free to contest the proceeding; and there is the less difficulty in leaving the stipulation on this footing, as the case may never happen, and will be pretty sure to happen but rarely. You will observe also, that in the passage from one port to another of the respective countries, the vessels of the neutral parties are to protect all persons without exception. Independently of the general principle asserted by the United States, this respect is due to the peculiar character of the coasting trade, and the utter improbability that it will at any time be a vehicle to persons of any obnoxious description.

On Article II.

The reasonableness of this article is manifest. Citizens or subjects of one country residing in another, tho' bound by their temporary allegiance to many common duties, can never be rightfully forced into military service, particularly external service, nor be restrained from leaving their residence when they please. The law of nations protects them against both; and the violation of this law, by the avowed impressment of American citizens residing in Great Britain, may be pressed with the greater force on the British Government as it is in direct inconsistency with her impressment of her own subjects bound by much stronger ties to the United States, as above explained, as well as with the spirit of her commercial laws and

policy, by which foreigners are invited to a residence. The liberation of the persons comprehended by this article therefore, cannot be justly or honorably refused, and the provision for their recompence and their return home, is equally due to the service rendered by, and the wrong done to them.

On Article III.

This regulation is comformable to the law of nations, and to the tenor of all treaties which define the belligerent claim of visiting and searching neutral vessels. No treaty can be cited in which the practice of compelling the neutral vessel to send its boat, its officers, its people or its papers to the belligerent vessel, is authorized. British treaties, as well as those to which she is not a party, in every instance where a regulation of the claim is undertaken, coincide with the article here proposed. The article is in fact almost a transcript of the article of the Treaty of 1786 between Great Britain and France.

The regulation is founded in the best reasons—1st. It is sufficient for the neutral, that he acquiesces in the interruption of his voyage, and the trouble of the examination, imposed by the belligerent Commander. To require a positive and active co-operation on his part in behalf of the latter, is more than can be justified on any principle. 2d. The belligerent party can always send more conveniently to the neutral vessel, than this can send to the belligerent vessel; having neither such fit boats for the purpose, especially in a rough sea, nor being so abundantly manned. 3d. This last consideration is enforced by the numerous and cruel abuses committed in the practice of requiring the neutral vessel to send to the belligerent. As an example you will find in the documents now transmitted a case where neither the smallness and leakiness of the boat, nor the boisterous state of the weather, nor the pathetic remonstrances of the neutral commander had any effect on the imperious injunctions of the belligerent, and where the task was performed at the manifest

peril of the boat, the papers, and the lives of the people. The limitation of the number to be sent on board the neutral vessel is a reasonable and usual precaution against the danger of insults and pillage.

On Article IV.

This enumeration of contraband articles is copied from the Treaty of 1781 between Great Britain and Russia. It is sufficiently limited, and that treaty is an authority more likely than any other, to be respected by the British Government. The sequel of the article, which protects the productions of an hostile colony converted into neutral property, is taken from the same model, with the addition of the terms "in any case or on any pretext." This addition is meant to embrace more explicitly, our right to trade freely with the colonies at war with Great Britain, and between them and all parts of the world in colonial productions, being at the time not enemy's but neutral property; a trade equally legitimate in itself with that between neutral countries directly and in their respective vessels, and such colonies, which their regulations do not contest.

In support of this right, in opposition to the British doctrine, that a trade not allowed by a nation in time of peace, cannot be opened to neutrals in time of war, it may be urged, that all nations are in the practice of varying more or less in time of war their commercial laws, from the state of these laws in time of peace, a practice agreeable to reason as well as favorable to neutral nations; that the change may be made in time of war, on considerations not incident to a state of war, but on such as are known to have the same effect in time of peace; that Great Britain herself is in the regular practice of changing her navigation and commercial laws, in time of war, particularly in relation to a neutral intercourse with her colonies; that at this time she admits a trade between neutral countries and the colonies of her enemies, when carried on directly between, or between the former and herself, interrupting only

a direct trade between such colonies and their parent state, and between them and countries in Europe, other than those to which the neutral trade may respectively belong; that as she does not contest the right of neutrals to trade with hostile colonies, within these limitations the trade can be and actually is carried on indirectly between such colonies and all countries, even those to which the colonies belong; and consequently that the effect of her doctrine and her practice, is not to deprive her enemy of their colonial trade but merely to lessen the value of it in proportion to the charges incident to the circuitous course into which it is forced; an advantage to her which if just in itself, would not be sufficiently so to balance the impolitic vexations accruing to neutral and friendly nations.

These views of the subject have entered into my conversations with Mr. Merry. He expresses, notwithstanding, a belief that Great Britain will turn an unfavorable ear to any proposition calculated to give her enemies the resources of their colonial trade, beyond the degree in which her present regulations permit. This is doubtless to be apprehended; but considering the proposition as an article which may find a balance in the general bargain, it may not be inadmissible; or if inadmissible in the extent proposed, a middle ground may perhaps be accepted. The colonial trade in question consists of four branches; first between the colonies and Great Britain herself; secondly, between the colonies and the neutral countries carrying on the trade; thirdly between the colonies and neutral countries not themselves carrying on the trade; fourthly, between the colonies and the countries to which they belong or which are parties to the war with Great Britain.

The first and second branches are those with which her own regulations accord. The last is that to which her aversion will of course be the strongest. Should this aversion be unconquerable, let it be tried then, and then only, whether on our yielding or rather omitting that point, she will not yield to us in return the direct trade between hostile colonies

and neutral colonies generally. You will be careful, however, so to modify the compromise as will mark as little as may be, a positive relinquishment of the direct trade between the belligerent nations and their colonies.

Should such a compromise be altogether rejected, you will limit the article to the simple enumeration of contraband, it being desirable that without a very valuable consideration, no precedent should be given by the United States of a stipulated acknowledgment that free ships do not make free goods. And you will omit the article altogether, if a proper list of contraband cannot be agreed on, particularly one that excludes money, provisions and naval stores.

On Article V.

This article taken from the Convention of 1800 between the United States and France, is conformable to the general practice of the prize Courts in the latter, and is the more worthy of adoption every where as it would contribute so much to the consistency and stability of the rules of Admiralty proceedings. Without a single objection justly lying against it, it will have the important advantages, of being a check on the inferior tribunals, of enabling the superior tribunal where a faulty reason appears on the face of the sentence, to correct the wrong without delay or expense, and of being a check moreover on the decision of the superior tribunal itself. As prize causes also are tried by courts not of a third party, but of one of the parties interested, it is but reasonable that the ground should be known to the other on which judgment has passed against its citizens or subjects; in order, if deemed proper, that negotiations may be employed for redressing past or guarding against future injustice.

On Article VI.

The fictitious blockade proclaimed by Great Britain and made the pretext for violating the commerce of neutral nations, has been one of the greatest abuses ever committed

on the high seas. During the late war they were carried to an extravagance which would have been ridiculous, if in their effects they had not inflicted such serious and extensive injuries on neutral nations. Ports were proclaimed in a state of blockade, previous to the arrival of any force at them, were considered in that state without regard to intermissions in the presence of the blockading force, and the proclamations left in operation after its final departure; the British cruizers during the whole time seizing every vessel bound to such ports, at whatever distance from them, and the British prize courts pronouncing condemnations wherever a knowledge of the proclamation at the time of sailing could be presumed, altho' it might afterwards be known that no real blockade existed. The whole scene was a perfect mockery, in which fact was sacrificed to form, and right to power and plunder. The United States were among the greatest sufferers; and would have been still more so, if redress for some of the spoliations proceeding from this source, had not fallen within the provisions of an article in the Treaty of 1794.

From the effect of this and other arbitrary practices of Great Britain, on the temper and policy of neutral nations towards her; from the spirit of her Treaty made near the close of the late war with Russia; from the general disposition manifested at the beginning of the present, towards the United States, and the comparative moderation observed in Europe with respect to blockades (if indeed the two cases of the Weser and Elbe are not to be excepted) it was hoped that the mockeries and mischiefs practised under the name of blockades, would no where be repeated. It is found however that the West Indies are again the Theatre of them. The three entire and extensive Islands of Martinique, Guadaloupe and St. Domingo have been published as in a state of blockade, altho' the whole naval force applied to the purpose is inconsiderable, altho' it appears that a part of this inconsiderable force is occasionally seen at the distance of many leagues at sea; altho' it does not appear that more than one or two

ports at most, have at any time been actually blockaded; and although complaints are heard that the British ships of war do not protect their own trade, against the numerous cruizers from the Islands under this pretended blockade.

Inclosed herewith are three letters on this subject, two from me, the first to Mr. Thornton, the second to Mr. Merry, and the third from Mr. Merry to me. You will observe that he does not pretend to justify the measures pursued in the West Indies; but on the contrary wishes them to be regarded as proceeding from an officer who does not pursue the intentions of his Government. Still such measures prove that no general regulations or orders have been yet issued by that Government against the evil, as might reasonably have been expected; and that a stipulated security against it, is an object as important as it is just.

In the two letters to Mr. Thornton and Mr. Merry, the ground is marked out on which you will be able to combat the false blockades, and to maintain the definition of a real one, contained in the proposed article which is a literal copy from the 4th article of the Russian Treaty above cited. In addition to these letters, you will find enclosed a letter of the of to Mr. Pinckney, in which some views are taken of the subject, which may also be of use in your discussions with the British Government.

On Article VII.

This article is due, if not to all neutrals, at least to the United States, who are distinguished by the distance of their situation. Decisions of the British Court of Admiralty, have so far respected this peculiarity as to admit a want of information as a plea for going to a blockaded port, where such a plea would be refused to less remote countries. But more than this may fairly be claimed. A vessel, knowing that a particular blockade existed two months before, may well conjecture that before her arrival at the port, which will require two months more, the blockade will have ceased;

and may accordingly clear and steer for such a port with an honest intention, in case of finding on her approach, the fact otherwise, not to attempt an unlawful entrance. To condemn vessels under such circumstances would be manifestly unjust; and to restrain them from a distant voyage to a port once in a state of blockade until information of a change shall have travelled a like distance, must produce a delay and uncertainty little short of an absolute prohibition of the commerce. To require them even to go out of their course, to seek at other ports information on the subject would be an unreasonable imposition. The British Government can have little objection to this article, after defining blockades as is agreed with Russia and as is here proposed; since our distance is of itself, a security against any concert with the blockaded, for surreptitious entries, which might be attempted by nearer adventurers; and since in the case of blockades by a force actually present, a preliminary notice may be required without impairing their efficacy as might be the case with blockades, such as the preceding article guards against.

The only difference between the articles as standing in the different columns, consists in the preamble to that which is to be admitted, if the proposition of the other should not succeed. The article is preferable without the recital of any reason particular to the United States, because as a naked stipulation, it strengthens instead of weakening a general principle friendly to neutral and pacific nations.

On Article VIII, IX, and X.

These are articles which are known to have been long wished and contemplated on the part of Great Britain, and together with the justice and in many views the expediency to Great Britain herself of the articles desired on our part, may induce her to accede to the whole. The articles are in substance the same with a project offered to the American administration in the year 1800 by Mr. Liston, who appears to have borrowed it from corresponding stipulations in the Convention

between the United States and France in the year ——. The project was at that time dropped, owing perhaps in part to the change in the head of the Department of State, between whom and Mr. Liston it had been discussed, and principally, to the difficulty of combining with it proper stipulations against British impressments on the high seas. Without such an equivalent, the project had little to recommend it to the United States. Considered by itself it was too the less admissible as one of its articles, under some obscurity of expression, was thought to favor the British pretension to impress British seamen from American vessels on the high seas.

A copy of this document is inclosed, as it may be not without use in shewing the ideas of the British Government at that time; so far at least as its Minister here was an organ of them.

The terms in which these articles are to be proposed, differ but slightly from those in which they may be admitted. In the former the delivery of deserters is confined to soldiers and seamen, without requiring a delivery of officers, whose desertion will not be from the service of their country; but on account of offences for which it might sometimes be more agreeable to the United States to be unbound to give them up for trial and punishment. At the same time this consideration ought not to be a bar to an arrangement, which in its general character will be so important to the interests of the United States.

On Article XI.

This is a stipulation which is not to be yielded but in the event of its being made an indispensable condition. It cannot be essential for the object of it, whilst the British Government is left free to take the precautions allowable within its own jurisdiction for preventing the clandestine departure of its seamen or its soldiers in neutral vessels. And it is very ineligible to the United States, inasmuch as it will be difficult to enforce the prohibition, whether we regard

the embarkation of such persons in British ports, or their landing on the American shores; and inasmuch as the inefficacy of regulations for such purposes tho' made with due sincerity and care, may become a source of secret jealousy and dissatisfaction, if not of controversy and reproach.

The article is copied from that in the arrangement (of which you have a copy) discussed and brought near to a conclusion between Mr. King and the British Ministry and you are authorized to accede to it, on the supposition, that it may again be insisted on. It is to be recollected however that the article was then understood to be the only price given for relinquishing the impressment of American seamen. The other offers now substituted will justify you in pressing the omission of the original one.

On Article XII.

The law of nations does not exact of neutral powers the prohibition specified in this article. On the other hand it does not restrain them from prohibiting a trade which appears on the face of the official papers proceeding from the custom house to be intended to violate the law of nations, and from which legitimate considerations of prudence may also dissuade a Government. All that can be reasonably expected by belligerent from neutral powers, is that their regulations on this subject be impartial, and that their stipulations relative to it, when made in time of war at least, should not preclude an impartiality.

It is not certain what degree of value Great Britain may put on this article, connected as it essentially is with the article which limits the list of contraband. It will at least mitigate her objection to such a limitation. With the range given to contraband by her construction of the law of nations, even as acquiesced in by the United States, a stipulation of this sort would be utterly inadmissible.

The last article, in making this City, the place for exchanging the ratifications, consults expedition in putting the

Treaty into operation, since the British ratification can be forwarded at the same time with the instrument itself. And it is otherwise reasonable that as the negotiation and formation of the Treaty will have taken place at the seat of the British Government, the concluding formality should be at that of the Government of the United States.

In addition to these articles, which with the observations thereon, I am charged by the President to communicate to you as his instructions, he leaves you at liberty to insert any others which may do no more than place British armed vessels with their prizes on an equality within our ports and jurisdiction, with those of France. This would only stipulate what would probably be done by gratuitous regulations here, and as it would no doubt be acceptable to Great Britain, it may not only aid in reconciling her to the principal objects desired by the United States, but may induce her to concur in the further insertion of articles, corresponding with those in the Convention of 1800 with France, which regulate more precisely and more effectually the treatment of vessels of the neutral party on the high seas.

The occasion will be proper also, for calling the attention of the British Government to the reasonableness of permitting American Consuls to reside in every part of her dominions, where, and so long as, she permits our citizens to trade. It is not denied that she has a natural right to refuse such a residence, and that she is free by her treaty with us, to refuse it in other than her European dominions. But the exception authorized with respect to the residence of Consuls elsewhere, having reference to the refusal of our trade elsewhere, the refusal of the one ought manifestly to cease with the refusal of the other. When our vessels and citizens are allowed to trade to ports in the West Indies, there is the same reason for a contemporary admission of Consuls to take care of it, as there is for their admission in ports where the trade is permanently allowed. There is the juster expectation of your success on this point, as some official patronage is due to

the rights of our citizens in the prize courts established in the West India Islands. Should the British Government be unwilling to enter into a stipulated provision, you may perhaps obtain an order to the Governors for the purpose: or if consuls be objected to altogether, it is desirable that agents may be admitted, if no where else, at least in the Islands where the Vice Admiralty Courts are established.

It has been intimated that the articles as standing in the different columns, are to be considered, the one as the offer to be made, the other as the ultimatum to be required. This is however not to be taken too strictly, it being impossible to forsee the turns and the combinations, which may present themselves in the course of the negotiation. The essential objects for the United States are the suppression of impressments and the definition of blockades. Next to these in importance, are the reduction of the list of contraband, and the enlargement of our neutral trade with hostile colonies. Whilst you keep in view therefore those objects, the two last as highly important, and the two first as absolutely indispensable, your discretion, in which the President places great confidence, must guide you in all that relates to the inferior ones.

With sentiments of great respect and esteem,

I remain sir, Your most Ob Sert.

## TO ROBERT R. LIVINGSTON.[1]

D. OF S. MSS. INSTR.

DEPARTMENT OF STATE, January 31, 1804.

SIR,

The two last letters received from you bear date on the and 30th of September, so that we have been now four months without hearing from you. The last from me to you was

[1] On February 7 Madison wrote to Livingston:

The public letters you will receive by this conveyance acknowledge all the letters rec[d] from you since the date of those last written to you, except your correspondence with M[r] Monroe. This I

dated on the 16th day of January, giving you information of the transfer of Louisiana on the 20th of December by the French Commissioner Mr. Laussat to Governor Claiborne and General Wilkinson, the Commissioners appointed on the part of the United States to receive it. The letters subsequent to that date from Governor Claiborne who is charged with the present administration of the ceded territory shew that the occupancy by our troops of the military posts on the Island of New Orleans and on the Western side of the Mississippi was in progression, and that the state of things in other respects was such as was to be expected from the predisposition of the bulk of the inhabitants and the manifest advantages to which they have become entitled as citizens of the United States. A bill providing for the Government of the territory has been some time under the deliberation of the Senate, but has not yet passed to the other branch of the Legislature. The enclosed copy shews the form in which it was introduced. Some alterations have already been made and others may be presumed. The precise form in which it will pass cannot therefore be foreknown; and the less so as the peculiarities and difficulties of the case give rise to more than the ordinary differences of opinion. It is pretty certain that the provisions generally contemplated will leave the people of that District for a while without the organization of power dictated by the Republican theory; but it is evident that a sudden transition to a condition so much in contrast with that in which their ideas and habits have been formed, would be as unacceptable and as little beneficial to them as it would be difficult for the

have thought proper to acknowledge in a private letter because I have not placed it on the files of the office. You left me free to consider the letters which passed between you as private, and I have not yet decided that it can be of use to dispose of them as of a public nature. Should it on further consideration be deemed proper to view them in this light, they can at any time be deposited in the office; whereas if now deposited, and a further consideration should oppose this use of them, the step would be irrevocable. It is much to be desired, on various grounds, that the mutual sensibilities which betray themselves in the corre-

Government of the United States. It may fairly be expected that every blessing of liberty will be extended to them as fast as they shall be prepared and disposed to receive it. In the mean time the mild spirit in which the powers derived from the Government of the United States will under its superintendence be administered, the parental interest which it takes in the happiness of those adopted into the general family, and a scrupulous regard to the spirit and tenor of the Treaty of Cession, promise a continuance of that satisfaction among the people of Louisiana which has thus far shewn itself. These observations are made that you may be the better enabled to give to the French Government the explanations and assurances due to its solicitude in behalf of a people whose destiny it has committed to the justice, the honor and the policy of the United States.

It does not appear that in the delivery of the Province by the Spanish authorities to Mr. Laussat any thing passed denoting its limits either to the East, the West or the North; nor was any step taken by Mr. Laussat, either whilst the province was in his hands or at the time of his transferring it to ours, calculated to dispossess Spain of any part of the

spondence should have no greater publicity than may be inevitable, and that no insuperable obstacles should be thrown in the way of that oblivion of disagreeable incidents, which cannot but be favored by your mutual respect and liberality. . . . . .

You will find in the public letter the reasons for not heretofore forwarding a letter of leave, and of the intention to forward one only on rect of your determination to make use of it. It was not wished to take any step which might be misinterpreted as an instruction for your return, and it was conceived that the letter you possess could, if your return was resolved on, without impropriety be made use of. The date alone suggests any difficulty, and that admits so easy an explanation, as scarcely to be regarded as one. You will I am persuaded be sensible that the footing on which the matter has been put was that deemed most consistent with the delicacy & friendship entertained for you, and which seemed best to reconcile a due respect for your personal inclinations with the respect due to the interest the public has in your diplomatic services.—*Mad. Mss.*

territory East of the Mississippi. On the contrary in a private conference he stated positively that no part of the Floridas was included in the Eastern boundary; France having strenuously insisted to have it extended to the Mobille, which was peremptorily refused by Spain.

We learn from Mr. Pinckney that the Spanish Government holds the same language to him. To the declaration of Mr. Laussat however we can oppose that of the French Minister made to you, that Louisiana extended to the River Perdido; and to the Spanish Government as well as to that of France we can oppose the Treaties of St. Ildefonso, and of September 30, 1803, interpreted by facts and fair inferences. The question with Spain, will enter into the proceedings of Mr. Monroe, on his arrival at Madrid, whither he will be instructed to repair, as soon as he shall have executed at London, the instructions lately transmitted to him in relation to the impressment of seamen from American vessels, and several other points which call for just and stipulated arrangements between the two countries. As the question relates to the French Government, the President relies on your prudence and attention for availing yourself of the admission by Mr. Marbois, that Louisiana extended to the River Perdido, and for keeping the weight of that Government in our scale, against that of Spain. With respect to the Western extent of Louisiana, Mr. Laussat held a language more satisfactory. He considered the Rio Bravo or Del Norde as far as the 30° of North latitude, as its true boundary on that side. The Northern boundary we have reason to believe was settled between France and Great Britain by Commissioners appointed under the Treaty of Utrecht, who separated the British and French territories west of the Lake of the Woods by the 49° of Latitude. In support of our just claims in all these cases, it is proper that no time should be lost in collecting the best proofs which can be obtained. This important object, has already been recommended generally to your attention. It is particularly desirable that you should procure an authenticated copy of the

commercial charter granted by Louis XIV. to Crozat in 1712, which gives an outline to Louisiana favorable to our claims, at the same time that it is an evidence of the highest and most unexceptionable authority. A copy of this charter is annexed to the English translation of Joutel's Journal of La Salle's last voyage, the French original not containing it. A record of the charter doubtless exists in the archives of the French Government, and it may be expected that an attested copy will not be refused to you. It is not improbable that the charter or other documents relating to the Mississippi project a few years after, may afford some light and be attainable from the same source. The proceedings of the Commissioners under the treaty of Utrecht, will merit particular research; as they promise not only a favorable Northern boundary, but as they will decide an important question involved in a convention of limits now depending between the United States and Great Britain. To those may be added whatever other documents may occur to your recollection or research, including maps &c. If the secret Treaty of Paris in 1762–3 between France and Spain, and an entire copy of that of St. Ildefonso in 1800 can be obtained, they may also be useful. An authentication of the precise date at least of the former, is very important. You will be sensible of the propriety of putting Mr. Monroe in possession of all the proofs and information which you may obtain. Should he take Paris in his way to Madrid, you will have the best of opportunities for the purpose. . . .[1]

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TO JAMES MONROE. MAD. MSS.

WASHINGTON, Feby 16, 1804

DEAR SIR In a private letter by Mr. Baring I gave you a

[1] The omitted portion of the instruction relates to the payment of claims under the convention of 1800 with France, trade with Santo Domingo, and the convention with Spain.

detail of what had passed here on the subject of *etiquette*.[1] I had hoped that no farther *jars would have ensued* as I still *hope that the good sense* of the *British government* respecting the right of the *government here to fix its routes of intercourse* and the sentiments and *manners of* the *country to which* they *ought to be adapted* will give the proper *instructions for preventing* like *incidents in future*. In the mean time a fresh *circumstance has taken place which calls for explanation*.[2]

The President desirous of *keeping open for cordial civilities* whatever channels the *scruples of M^r My* might not have *closed asked* me what these were *understood to be* and particularly whether he would *come and take friendly* and *familar dinners with him I* undertook to *feel his pulse* thro' some *hand* that *would do it* with the least *impropriety*. From the information *obtained I inferred* that an *invitation* would be readily *accepted* and with the *less doubt* as *he had dined with me* (his *lady declining*) *after* the *offence originally taken*. The *invitation was accordingly sent* and terminated *in the note from him to me & my answer herewith inclosed*. *I* need not comment on this *display* of *diplomatic* superstition, truly extraordinary in *this age and in this country*. We are willing to refer it to the *personal character of a man* accustomed to *see importance in such trifles* and over *cautious* against displeasing *his government* by *surrendering* the *minutest* of *his or its pretensions* What we *apprehend is*, that with these causes may be mingled a *jealousy* of *our disposition towards England* and that the mortifications which *he has inflicted on himself* are to be set *down to that account*. In fact it is known that this *jealousy*

[1] Italics for cypher.

[2] It was generally thought at the time that the Merry incident was nursed to imposing proportions by Mrs. Merry. Mrs. Samuel Harrison Smith thus describes her under date January 23, 1804: "She is said to be a woman of fine understanding and she is so entirely the talker and actor in all companies, that her good husband passes quite unnoticed." *The First Forty Years of Washington Society*, 46. Henry Adams, however, gives a different view in his *History of the United States*, ii., 367 *et seq.*

particularly *since the final adjustment with France* exists or is *affected in a high degree* and will doubtless give its *colour to the correspondence of the legation* with *its government.* To apply an *antidote to this poison* will require *your vigilant and prudent attention.* It can scarcely be believed that the British Gov$^{t}$ will not at once see the *folly committed by its representative* especially in the last *scene of the farce* and that it will set *him right in that respect.* But it may *listen* with a different *ear to suggestions* that the U. S. having now *less need of* the *friendship of Britain* may be yielding to a *latent enmity towards her.* The best of all proofs to the *contrary would* be the *confidential communications* you possess, if it were not an improper condescension to disclose them for such a purpose. Next to that is the tenor of our measures, and the dictates of our obvious policy; on an appeal to both of which you may found the strongest assurances that the Gov$^{t}$ of the U. S. is sincerely and anxiously disposed to cultivate harmony between the two Nations. The President wishes you to *lose no oppor$^{y}$. and spare* no *pains* that may be necessary to *satisfy the British* Administration *on this head* and to *prevent or efface* any *different impressions* which may be *transmitted from hence.*

I collect that the *cavil at the pele mele here established* turns much on the alledged *degradation* of *ministers* and *envoies to a level with chargés d'affaires.* The truth is, and I have so *told M$^{r}$. Merry* that this is not the idea; that the President did not mean to decide anything as to their comparative grades or importance; that these would be *estimated as heretofore;* that among themselves they might fix their own ceremonies, and that even at the *President's table they might seat themselves* in any *subordination they pleased.* All he meant was that no seats were to be designated for them, nor the order in which they might happen to sit to be any criterion of the respect paid to their respective commissions or Countries. On public occasions, such as an Inaugural speech &c. the Heads of Depts, with foreign Ministers, and others invited on the part of the Gov$^{t}$ would be in the same pêle mêle within the space assigned

them. It may not be amiss to recollect that under the old Congress, as I understand, and even in the ceremonies attending the introduction of the new Gov^t^ the foreign ministers were placed according to the order in which their Gov^t^ acknowledged by Treaties the Independence of the U. States. In this point of view the pêle mêle is favorable both to G. B. and to Spain.

I have, I believe already told you that the President has discountenanced the *handing first to* the *table* the *wife of a head of department* applying the general *rule of pele mele to that as to other cases.*

The Marquis d'Yrujo joined with *Merry in refusing an invitation* from the *Pres^t^ & has* throughout *made a common cause with him* not however approving all the grounds taken by the latter. His case is indeed different and not a little awkward; having acquiesced for nearly three years in the practice ag^st^ which he now revolts. *Pichon* being *a chargé only*, was *not invited* into the *pretensions of the two Plent.* He blames their *contumacy but* I find *he has reported* the *affair to his government* which is not likely to *patronize* the *cause of Merry & Yrujo.*

*Thornton* has *also declined an invitation from the Pres^t^* This shews that *he unites* without necessity *with Merry. He has* latterly expressed much *jealousy of our views* founded on *little and unmeaning circumstances.*

*The manners* of M.^r^ M. *disgust* both *sexes* and *all parties.* I have time to add only my affec^te^ respects.

*M.^r^ Merry has the honor to present his respects to M.^r^ Madison.*

*He has just* had that of receiving a note from the *Presid^t^ of the U S* of which the following *is a copy.*

*Thomas Jefferson asks the favor of M.^r^ Merry to dinner with a small party of friends on monday the 13th at half past three Feb*: 9, 04.

It so happens that *M.^r^ Merry has engaged some company to dine with him on that day. Under other circumstances however* he

would have informed himself whether it is *the usage as is the case in most countries for private engagements of* every kind to give *way to invitations* from the *chief magistrate of the U. S.* and if such were the *usage he would not have* failed to have alleged it as a *just apology for not receiving the company* he has *invited.* But after the communication which *Mr Merry had the honor to receive from Mr. Madison* on the 12th of last month respecting the *alteration which the Presidt* of the United States had thought proper should take *place in regard to the treatment to be observed by the Executive government towards foreign ministers from those usages which had been established by his predecessors and after the reply which Mr Merry* had the honor to make to that *notice* stating that notwithstanding all his anxiety to *cultivate the most intimate and cordial intercourse with every of the government he could not take upon himself to acquiesce in that alteration* on account of its serious nature, which he would therefore *report to his own government and wait for their instructions upon it,* it is necessary that he should have the honor of observing to *Mr Madison that* combining the terms of the *invitation* above mentioned with the circumstances which have *preceded it Mr Merry can only* understand it to be *addressed to him in his private capacity and not as his Britannic Majestys minister* to the United States. Now, however anxious he may be, as he certainly is, to give effect to *the claim* 1424. 1293[1] *above expressed of conciliating personally and privately the good opinion and esteem of Mr Jefferson* he hopes that the latter will feel how *improper it would be on his part to sacrifice* to that desire *the duty which he owes to his Sovereign* and consequently how impossible it is for him to *lay aside the consideration of his public character.*

*If Mr Merry should be mistaken as to the meaning of Mr Jefferson's note and it should prove that the invitation is designed for him in his public capacity* he trusts that *Mr Jefferson* will

[1] Not deciphered.

feel equally, that it must be *out of his power to accept* it without receiving previously, through the channel of the *Secretary of State the necessary formal assurances of the President's determination to observe towards him those usages of distinction* which have heretofore been shewn by the *executive government of the U. S. to the persons who have been accredited to them as his majesty's ministers.*

*Mr. Merry has the honor to* request of *Mr. Madison* to lay this *explanation* before the *President and to accompany it with* the strongest assurances of his highest respect and consideration.

WASHINGTON, February 9, 1804.

*Mr. Madison* presents his compliments to *Mr. Merry. He has communicated to the President Mr. Merry's note of this morning* and has the honor to remark to him that the *President's invitation* being in the *stile used by him in like cases* had no reference to the points *of form which will deprive him of the pleasure of Mr. Merry's company at dinner on Monday next.*

*Mr. Madison tenders to Mr Merry his* distinguished consideration.

WASHINGTON, Feby 9 1804.

## TO ROBERT R. LIVINGSTON.

D. OF S. MSS. INSTR.

DEPARTMENT OF STATE March 31st 1804.

SIR,

Since my acknowledgment of yours of Oct. 20 & 31, I have received those of 2d, 15 & 23d November and 11th December.

In mine of January 31 I informed you that Louisiana had been transferred by the French Commissioner to our Commissioners on the 20th of December—that nothing had officially passed on the occasion concerning the boundaries of the ceded territory[1]; but that *Mr. Laussat had confidentially signified*

[1] There is a copy of this instruction up to the part which encloses the correspondence with D'Yrujo in Madison's letter book in the

*that it did not comprehend any part of West Florida; adding at the same time that it extended westwardly to the Rio Bravo otherwise called Rio del Norde.* Orders were accordingly obtained from the Spanish authorities for the delivery of all the posts on the West side of the Mississippi as well as on the Island of New Orleans. With respect to the posts in West Florida, orders for the delivery were neither offered to, nor demanded by our Commissioners. No instructions have in fact been ever given them to make the demand. This silence on the part of the Executive was deemed *eligible first because it was foreseen that the demand would not only be rejected by the Spanish authority at New Orleans which had in an official publication limited the Cession Westwardly by the Mississippi and the Island of New Orleans, but was apprehended as has turned out, that the French Commissioner might not be ready to support the demand, and might even be disposed to second the Spanish opposition to it; secondly because in the latter of these cases a serious check would be given to our title, and in either of them a premature dilemma would result between an overt submission to the refusal and a resort to force; thirdly* because mere silence would be no bar to a plea at any time that a delivery of a part, particularly of the Seat of Government, was a virtual delivery of the whole; whilst in the mean time, we could ascertain the views and claim the interposition of the French Government, and avail ourselves of that and any other favorable circumstances for effecting an amicable adjustment of the question with the Government of Spain. In this state of things it was deemed proper by Congress in making the regu-

Chicago Historical Society. Those portions which are printed in italics are in cypher in the letter book copy.

On June 20, 1804, Livingston wrote to Madison: "I should not hesitate to take possession of West Florida and act as if no doubt could be entertained of our title. Once in possession, France will find it necessary to make Spain acquiesce in it, as it would be very repugnant to her interest at this time to suffer hostilities between the two nations which would render it still more difficult for Spain than it now is—and it is now sufficiently so—to pay her tribute to France."—*Mad. Mss.*

lations necessary for the collection of Revenue in the Ceded territory and guarding against the new danger of smuggling into the United States thro' the channels opened by it, to include a provision for the case of West Florida by vesting in the President a power which his discretion might accommodate to events. This provision is contained in the 11th taken in connection with the 4th Section of the Act herewith inclosed. The Act had been many weeks depending in Congress with these Sections word for word in it; the Bill had been printed as soon as reported by the Committee for the use of the members, and as two copies are by a usage of politeness always allotted for each foreign Minister here it must in all probability have been known to the Marquis D'Yrujo in an early stage of its progress. If it was not, it marks much less *of that zealous vigilance over the concerns of his Sovereign than he now makes the plea for his intemperate conduct.* For some days even after the Act was published in the Gazette of this City, be was silent. At length however he called at the Office of State, with the Gazette *in his hand, and entered into a very angry comment* on the 11th Section, which was answered by remarks (some of which it would seem from this written allusion to them were not well understood) calculated to assuage his dissatisfaction with the law, as far as was consistent with a candid declaration to him that we considered all of West Florida Westward of the Perdido as clearly ours by the Treaty of April 30, 1803, and that of S'Ildefonso.[1] The conversation ended as might be inferred from his letters which followed it on the 7th and 17th inst., of which copies are herewith enclosed, as are also copies of my answer of and of his reply of . You will see by this correspondence,

[1] On April 10 Madison instructed Pinckney:

It is unnecessary to enter into a particular comment on the rude or rather insulting language which the Marquis D'Yrujo did not restrain himself from addressing to the Government of the United States. To speak of an Act of Congress as an "atrocious libel" after acknowledging that he had found it to be their Act; as an insulting usurpation of

the footing on which, *a rudeness which no Government can tolerate has placed him with this Government, and the view of it which must be unavoidably conveyed to our Minister at Madrid.* It may be of some importance also that it be not misconceived where you are. But the correspondence is chiefly of importance *as it suggests the earnestness with which Spain is likely to contest our construction of the Treaties of Cession, and the Spanish reasoning which will be employed against it; and consequently as it urges the expediency of cultivating the disposition of the French Government to take our side of the question.* To this she is bound no less by sound policy, than by a regard to right.

She is bound by the former; because the interest she has

the unquestionable rights of his Sovereign; and as a direct contradiction to the assurances given to him from the President, would have justified an answer less mitigated than was given. The Spanish Government by making the case its own, will feel what it became the Government of the United States to feel, and will doubtless derive from that source and from a regard to the friendship between the two nations of which the Government of the U. States has given an example, the determinations comporting with the occasion. The President does not ask a recall of the Spanish Envoy, nor any particular animadversion on him. In consulting the respect which he owes to his station and to himself, he does not forget the laudable deportment of the Marquis D'Yrujo on other occasions and is willing to make all the allowance which can be reasonably claimed for a fervid zeal in a faithful functionary. But it is obvious that the intemperance and disrespect of this minister towards the Government of the United States on the present occasion has placed him on a footing unfriendly to the habitual cordiality with which intercommunications here between the two Governments have been conducted; and it will remain with the Spanish Government in appreciating this circumstance to provide as it may judge best a suitable remedy for it. It might have been reasonably expected that the Marquis on finding the just displeasure given by his offensive language would be led by a return of his discretion to have substituted a proper one. Instead of that prudent course, his reply retains so much of the tone of his first letter that no stronger proof could be given of the moderation of the President and his respect for every link of connection with Spain than his not making it an obstacle at once to all further intercourse with him *D. of S. Mss. Instr.*

in our friendship interests her in the friendship between us and Spain, which cannot be maintained with full effect, if at all, without removing the sources of collision lurking under a neighbourhood marked by such circumstances and which, considering the relation between France and Spain cannot be interrupted without endangering the friendly relations between the United States and France. A transfer from Spain to the United States of the territory claimed by the latter, or rather of the whole of both the Floridas on reasonable conditions, is in fact, nothing more than a sequel and completion of the policy which led France into her own treaty of Cession; and her discernment and her consistency are both pledges that she will view the subject in this light. Another pledge lies in the manifest interest which France has in the peaceable transfer of these Spanish possessions to the United States as the only effectual security against their falling into the hands of Great Britain. Such an event would be certain in case of a rupture between Great Britain and Spain, and would be particularly disagreeable to France, whether Great Britain should retain the acquisition for the sake of the important harbours and other advantages belonging to it, or should make it the basis of some transaction with the United States, which notwithstanding the good faith and fairness towards France (which would doubtless be observed on our part) might involve conditions too desirable to her enemy, not to be disagreeable to herself. It even deserves consideration that the use which Great Britain could make of the Territory in question, and the facility in seizing it, may become a casting motive with her to force Spain into War, contrary to the wishes and the policy of France.

The territory ceded to the United States is described in the words following "the Colony or province of Louisiana with the same extent that it now has in the hands of Spain, that it had when France possessed it, and such as it ought to be according to the Treaties subsequently passed between Spain and other States."

In expounding this three-fold description, the different forms used must be so understood as to give a meaning to each description, and to make the meaning of each coincide with that of the others.

The first form of description is a reference to the extent which Louisiana *now* has in the hands of Spain. What is that extent as determined by its Eastern limits? It is not denied that the Perdido was once the Eastern limit of Louisiana. It is not denied that the Territory now possessed by Spain extends to the river Perdido. The river Perdido we say then is the limits to the Eastern extent of the Louisiana ceded to the United States.

This construction gives an obvious and pertinent meaning to the term "now" and to the expression "in the hands of Spain" which can be found in no other construction. For a considerable time previous to the treaty of peace in 1783 between Great Britain and Spain, Louisiana as in the hands of Spain was limited Eastwardly by the Mississippi, the Iberville &c. The term "now" fixes its extent as enlarged by that Treaty in contradistinction to the more limited extent in which Spain held it prior to that Treaty. Again the expression "in the hands or in the possession of Spain" fixes the same extent, because the expression cannot relate to the extent which Spain by her internal regulations may have given to a particular district under the name of Louisiana, but evidently to the extent in which it was known to other nations, particularly to the nation in Treaty with her, and in which it was relatively to other nations in her hands and not in the hands of any other nation. It would be absurd to consider the expression " in the hands of Spain" as relating not to others but to herself and to her own regulations; for the territory of Louisiana in her hands must be equally so and be the same, whether formed into one or twenty districts or by whatever name or names it may be called by herself.

What may now be the extent of a provincial district under the name of Louisiana according to the municipal arrange-

ments of the Spanish Government is not perfectly known. It is at least questionable whether even these arrangements had not incorporated the portion of Louisiana acquired from Great Britain with the Western portion before belonging to Spain under the same Provincial Government. But whether such be the fact or not, the construction of the Treaty will be the same.

The next form of description refers to the extent which Louisiana had when possessed by France. What is this extent? It will be admitted that for the whole period prior to the division of Louisiana between Spain and Great Britain in 1762–3 or at least from the adjustment of boundary between France and Spain in 1719 to that event, Louisiana extended in the possession of France to the river Perdido. Had the meaning then of the first description been less determinate and had France been in possession of Louisiana at any time with less extent than to the Perdido, a reference to this primitive and long continued extent would be more natural and probable than to any other. But it happens that France never possessed Louisiana with less extent than to the Perdido; because on the same day that she ceded a part to Spain, the residue was ceded to Great Britain, and consequently as long as she possessed Louisiana at all, she possessed it entire that is in its extent to the Perdido. It is true that after the cession of Western Louisiana to Spain in the year 1762–3, the actual delivery of the Territory by France was delayed for several years, but it never can be supposed that a reference could be intended to this short period of delay during which France held that portion of Louisiana, without the Eastern portion, in the right of Spain only, not in her own right, when in other words she held it merely as the Trustee of Spain; and that a reference to such a possession for such a period should be intended rather than a reference to the long possession of the whole territory in her own acknowledged right prior to that period.

In the order of the French King in 1764 to Monsieur D'Abbadie for the delivery of Western Louisiana to Spain, it is

stated that the Cession by France was on the 3d of November and the acceptance by Spain on the 13th of that month, leaving an interval of ten days. An anxiety to find a period during which Louisiana as limited by the Mississippi and the Iberville was held by France in her own right may possibly lead the Spanish Government to seize the pretext into which this momentary interval may be converted. But it will be a mere pretext. In the first place it is probable that the Treaty of Cession to Spain which is dated on the same day with that to Great Britain was like the latter a preliminary treaty, consummated and confirmed by a definitive treaty bearing the same date with the definitive treaty including the Cession to Great Britain, in which case the time and effect of each Cession would be the same whether recurrence be had to the date of the preliminary or definitive treaty. In the next place, the Cession by France to Spain was essentially made on the 3d of November 1762 on which day the same with that of the cession to Great Britain the right passed from France. The acceptance by Spain ten days after, if necessary at all to perfect the deed, had relation to the dates of the Cession by France and must have the same effect and no other, as if Spain had signed the deed on the same day with France. This explanation which rests on the soundest principles nullifies this interval of ten days so as to make the Cession to Great Britain and Spain simultaneous on the supposition that recurrence be had to the preliminary Treaty and not to the definitive treaty; and consequently establishes the fact that France at no time possessed Louisiana with less extent than to the Perdido; the alienation and partition of the Territory admitting no distinction of time. In the last place conceding even that during an interval of ten days the right of Spain was incompleat, and was in transitu only from France, or in another form of expression that the right remained in France, subject to the eventual acceptance of Spain, is it possible to believe that a description which must be presumed to aim at clearness and certainty, should refer for its purposes to so

fugitive and equivocal a state of things, in preference to a state of things where the right and the possession of France were of long continuance and susceptible of neither doubt nor controversy. It is impossible. And consequently the only possible construction which can be put on the second form of description coincides with the only rational construction that can be put on the first; making Louisiana of the same extent that is to the River Perdido, both "as in the hands of Spain" and "as France possessed it."

The third and last description of Louisiana is in these words "such as it ought to be according to the Treaties subsequently passed between Spain and other States."

This description may be considered as an auxiliary to the two other and is conclusive as an argument for comprehending within the cession of Spain territory Eastward of the Mississippi and the Iberville, and for extending the cession to the river Perdido.

The only treaties between Spain and other nations that affect the extent of Louisiana as being subsequent to the possession of it by France are first the Treaty in 1783 between Spain and Great Britain and secondly the Treaty of 1795 between Spain and the United States.

The last of these Treaties affects the extent of Louisiana as in the hands of Spain, by defining the northern boundary of that part of it which lies East of the Mississippi and the Iberville. And the first affects the extent of Louisiana by including in the Cession from Great Britain to Spain, the Territory between that River and the Perdido; and by giving to Louisiana in consequence of that reunion of the Eastern and Western part, the same extent eastwardly in the hands of Spain as it had when France possessed it. Louisiana then as it ought to be according to treaties of Spain subsequent to the possession by France is limited by the line of demarkation settled with the United States and forming a Northern boundary; and is extended to the River Perdido as its Eastern boundary.

This is not only the plain and necessary construction of the words; but is the only construction that can give a meaning to them. For they are without meaning on the supposition that Louisiana as in the hands of Spain is limited by the Mississippi and the Iberville; since neither the one nor the other of those treaties have any relation to Louisiana that can affect its extent, but thro' their relation to the limits of that part of it which lies Eastward of the Mississippi and the Iberville. Including this part therefore, as we contend within the extent of Louisiana and a meaning is given to both as pertinent as it is important. Exclude this part, as Spain contends from Louisiana and no treaties exist to which the reference is applicable.

This deduction cannot be evaded by pretending that the reference to subsequent treaties of Spain was meant to save the right of deposit and other rights stipulated to the commerce of the United States by the Treaty of 1795; first because, altho' that may be an incidental object of the reference to that Treaty, as was signified by His Catholic Majesty to the Government of the United States, yet the principal object of the reference is evidently the territorial *extent* of Louisana: secondly, because the reference is to more than one treaty, to the Treaty of 1783 as well as to that of 1795, and the Treaty of 1783 can have no modifying effect whatever rendering it applicable, but on the supposition that Louisiana was considered as extending Eastward of the Mississippi and the Iberville into the Territory ceded by that Treaty to Spain.

In fine the construction which we maintain gives to every part of the Description of the Territory ceded to the United States, a meaning clear in itself and in harmony with every other part, and is no less conformable to facts, than it is founded in the ordinary use and analogy of the expressions. The construction urged by Spain gives, on the contrary, a meaning to the first description which is inconsistent with the very terms of it; it prefers in the second a meaning that is impossible or absurd; and it takes from the last all meaning whatever.

In confirmation of the meaning which extends Louisiana to the River Perdido, it may be regarded as most consistent with the object of the First Consul in the Cession obtained by him from Spain. Every appearance, every circumstance pronounces this to have been, to give lustre to his administration and to gratify natural pride in his nation, by reannexing to its domain possessions which had without any sufficient considerations, been severed from it; and which being in the hands of Spain, it was in the power of Spain to restore. Spain on the other side might be the less reluctant against the Cession in this extent as she would be only replaced by it, within the original limits of her possessions, the Territory East of the Perdido having been regained by her from Great Britain in the peace of 1783 and not included in the late cession.

It only remains to take notice of the argument derived from a criticism on the term "retrocede" by which the Cession from Spain to France is expressed. The literal meaning of this term is said to be that Spain gives back to France what she received from France; and that as she received from France no more than the territory West of the Mississippi and the Iberville that no more could be given back by Spain.

Without denying that such a meaning, if uncontrouled by other terms would have been properly expressed by the term "retrocede" it is sufficient and more than sufficient to observe 1st that with respect to France the literal meaning is satisfied; France receiving back what she had before alienated. Secondly that with respect to Spain, not only the greater part of Louisiana had been confessedly received by her from France, and consequently was literally ceded back by Spain as well as ceded back to France; but with respect to the part in question Spain might not unfairly be considered as ceding back to France what France had ceded to her; inasmuch as this Cession of it to Great Britain was made for the benefit of Spain, to whom on that account Cuba was restored. The effect was precisely the same as if France had in form made the Cession

to Spain and Spain had assigned it over to Great Britain; and the Cession may the more aptly be considered as passing thro' Spain, as Spain herself was a party to the Treaty by which it was conveyed to Great Britain. In this point of view, not only France received back what she had ceded, but Spain ceded back what she had received, and the etomology even of the term "retrocede" is satisfied. This view of the case is the more substantially just as the territory in question passed from France to Great Britain for the account of Spain but passed from Great Britain into the hands of Spain in 1783, in consequence of a War to which Spain had contributed but little compared with France, and in terminating which so favorably in this article for Spain, France had doubtless a preponderating influence. Thirdly, that if a course of proceeding might have existed to which the term "retrocede" would be more literally applicable, it may be equally said that there is no particular term which would be more applicable to the whole proceeding as it did exist. Fourthly, Lastly, that if this were not the case, a new criticism on the etimology of a single term can be allowed no weight against a conclusion drawn from the clear meaning of every other term and from the whole context.

In aid of these observation, I enclose herewith two papers which have been drawn up with a view to trace and support our title to Louisiana in its extent to the Perdido. You will find in them also the grounds on which its Western extent is maintainable against Spain, and its northern in relation to Great Britain.

On the whole we reckon with much confidence on the obligations & disposition of the French Government to favor our object with Spain, and on your prudent exertions to strengthen our hold on both, not only in relation to the true construction of the Treaty, but to our acquisition of the Spanish Territory Eastward of the Perdido on convenient and equitable conditions.

You will find herewith inclosed, copies of another corre-

spondence sufficiently explaining itself, with the Marquis D'Yrujo on the commerce from our ports to S' Domingo, to which is added a letter on that subject from Mr. Pichon. The ideas of the President, as well to the part which the true interest of France recommends to her, as to the part prescribed both to her and to the United States by the law of Nations were communicated in my letter of the 31st of January last. It is much to be desired that the French Government may enter into proper views on this subject. With respect to the trade in articles not for War there cannot be a doubt that the interest of France concurs with that of the United States. With respect to articles for War it is probably the interest of all nations that they should be kept out of hands likely to make so bad a use of them. It is clear at the same time that the United States are bound by the law of Nations to nothing further than to leave their offending citizens to the consequence of an illicit trade; and it deserves serious consideration how far their undertaking at the instance of one power to enforce the law of nations by prohibitory regulations to which they are not bound, may become an embarrassing precedent and stimulate pretensions and complaints of other powers. The French Government must be sensible also that prohibitions by one nation would have little effect, if others including Great Britain, should not follow the example. It may be added that the most which the United States could do in the case, short of prohibiting the export of contraband articles altogether, a measure doubtless beyond the expectations of France, would be to annex to the shipment of these articles a condition that they should be delivered elsewhere than in S' Domingo. and that a regulation of this kind would readily be frustrated by a reshipment of the articles after delivery elsewhere, in the same or other vessels in order to accomplish the forbidden destination. If indeed the prohibitory regulation on the part of the United States were the result of a stipulation and recommended by an equivalent concession, the objection to it as an inconvenient precedent would be avoided.

If, for example, France would agree to permit the trade with S'.Domingo in all other articles, on condition that we would agree to prohibit contraband articles, no objection of that sort would lie against the arrangement; and the arrangement would in itself be so reasonable on both sides and so favorable even to the people of S' Domingo, that the President authorizes you not only to make it, if you find it not improper, the subject of a frank conference with the French Government, but to put it into the form of a conventional regulation. Or, should this be objectionable, the object may be attained perhaps by a tacit understanding between the two Governments, which may lead to the regulations on each side respectively necessary. Altho' a legal regulation on our part cannot be absolutely promised, otherwise than by a positive and mutual stipulation, yet with a candid explanation of this constitutional circumstance, there can be little risk in inspiring the requisite confidence that the Legislative authority here would interpose its sanction.

It is more important that something should be done in this, and done soon, as the pretext founded upon the supposed illegality of any trade whatever with the negroes in S' Domingo, is multiplying depredations on our commerce not only with that Island but with the West Indies generally, to a degree highly irritating, and which is laying the foundation for extensive claims and complaints on our part. You will not fail to state this fact to the French Government in its just importance; as an argument for some such arrangement as is above suggested, or if that be disliked as requiring such other interposition of that Government as will put an end to the evil.

It is represented that a part of the depredations are committed by French armed vessels without Commissions, or with Commissions from incompetent authorities. It appears also that these lawless proceedings are much connected with Spanish ports and subjects, probably Spanish Officers also, in the West Indies, particularly in the Island of Cuba. So far as the responsibility of Spain may be involved, we shall not lose sight

of it. An appeal at the same time to that of France is as pressing as it is just, and you will please to make it in the manner best calculated to make it effectual.

In one of your letters you apprehended that the interest accruing from the delay of the Commissioners at Paris may be disallowed by the French Government, and wish for instructions on the subject. I am glad to find by late communications from Mr. Skipwith that the apparent discontent at the delay had subsided. But whatever solicitude that Government might feel for dispatch in liquidating the claims, it would be a palpable wrong to make a disappointment in that particular, a pretext for refusing any stipulated part of the claims. In a legal point of view, the Treaty could not be in force until mutually ratified; and every preparatory step taken for carrying it into effect however apposite or useful, must be connected with legal questions arising under the Treaty.

In other parts of your correspondence you seem to have inferred from some passage in mine that I thought the ten millions of livres in cash over which a discretion was given, ought to have been paid rather to France than to our creditor citizens. If the inference be just, my expressions must have been the more unfortunate as they so little accord with the original plan communicated in the Instructions to yourself and Mr. Monroe; the more unfortunate still as they not only decide a question wrong, but a question which could never occur. The cash fund of 10 millions was provided on the supposition that in a critical moment and in a balance of considerations the immediate payment of that sum as a part of the bargain might either tempt the French Government to enter into it or to reduce the terms of it. If wanted for either of these purposes, it was to be paid to the French Government: if not wanted for either it was made applicable to no other. The provision contemplated for the creditors had no reference to the fund of ten millions of livres; nor was it even contemplated that any other cash fund would be made applicable to their claims. It was supposed not unreasonable that

the ease of our Treasury and the chance and means of purchasing the territory remaining to Spain Eastward of the Mississippi, might be so far justly consulted, as to put the indemnification of the claims against France on a like footing with that on which the indemnification of like claims against Great Britain had been put. And it was inferred that such a modification of the payments would not only have fully satisfied the expectations of the creditors; but would have encountered no objections on the part of the French Government, who had no interest in the question, and who were precluded by all that happened from urging objections of any other sort.

Mr. Merry has formally complained of the expressions in your printed memorial which were construed into ill will towards Great Britain, and an undue partiality to the French Government. He said that he was expressly instructed by his Government to make this complaint; that the memorial was viewed by it in a very serious light, and that it was expected from the candor of the American Government and the relations subsisting between the two nations, that the unfriendly sentiments expressed in the memorial, if not authorized by instructions, as was doubtless the case, would be disavowed. He admitted that the memorial might not be an official paper, or an authenticated publication, but dwelt on the notoriety of its author, and on its tendency as an ostensible evidence of the spirit and views of so important and maritime a power as the United States, to excite animosity in other nations against Great Britain, and to wound her essential interests. He mentioned several circumstances known to himself whilst at Paris, among others conversations with you on the subject of the memorial which established the fact that it was written by you. If I did not mistake him he said that the fact was informally acknowledged to him by yourself, altho' you disowned it in an official point of view.

In reply it was, on the day following, observed to him, by the direction of the President, that the sentiments of the United States and of their Government towards Great Britain

were sincerely friendly, according to the assurances which had been given to him, and otherwise communicated, that we wished to cultivate the friendship between the two countries, as important to our as well as to his; that altho' we wished to maintain friendship at the same time with France and with all other Nations, we entertained no sentiments towards her or any other Nation, that could lessen the confidence of Great Britain in the equal sincerity of our friendship for her or in our strict impartiality in discharging every duty which belonged to us as a neutral nation; that no instruction could therefore have been given to any functionary of the United States to say or do anything unfriendly or disrespectful to Great Britain; that the memorial in question if written by you was a private and not official document, that the reasoning employed in it could have been intended merely to reconcile the French Government to the objects of the writer, not to injure or offend Great Britain; that as far as the memorial could be supposed to have a tendency to either, it resulted solely from its publication, a circumstance which there was every reason to believe had been without your sanction, and must have been followed by your disapprobation and regret. Mr. Merry, after repeating the sensibility of his Government to the incident of which he complained, and the importance attached to it, expressed much satisfaction at the explicit and friendly explanation he had heard, and his confidence that the favorable report which he should make of it, would be equally satisfactory to his Government.

From this view of the matter you will be sensible of the regret excited by your permission to the French Government mentioned in your letter of Dec^r 11 to publish the memorial as attributed to you. A publication of it by the French Government with a reference to you as the author, and without any denial on your part will doubtless be represented by the British Government as having all the authenticity and effect of a direct publication by yourself, as well as the appearance moreover of some sort of collusion with the French Govern-

ment against the British Government; and it may be fairly suspected that one object at least of the former in endeavoring to connect your name with the publication has been to engender or foster in the latter a distrust and ill humour towards the United States.

You will infer from these observations the wish of the President, that if no irrevocable step should have been taken in the case, the French Government may be induced, in the manner you may find most delicate to withdraw its request, and thereby relieve the Government of the United States from the necessity of further explanations to the British Government which will be more disagreeable as it may be the more difficult to make them satisfactory.

Congress adjourned on tuesday the 27th of March to the first monday in November next. Copies of their laws will be forwarded to you as soon as they issue from the press. For the present, I inclose herewith a list of all their acts, and copies of a few of them; particularly of the acts providing for the Government of Louisiana and for the war in the Mediterranean. The former it is hoped will satisfy the French Government of the prudent and faithful regard of the Government of the United States to the interest and happiness of the people transferred into the American family. The latter was thought a proper antidote to the unfortunate accident to the ship and men under Capt. Bainbridge before the harbour of Tripoli. The addition which it will enable the President to make to our force in the Mediterranean, will more than regain the ground lost with that regency, at the same time that it will impress on the others respect for our resources, and in a more general view be advantageous at the present crisis. It is probable that three or four frigates will soon proceed to join Commodore Preble.

I have the honor to be, &c.,

## TO JAMES MONROE

D. OF MSS. INSTR.

DEPARTMENT OF STATE, April 15, 1804.

SIR,

It being presumed that by the time of your receiving this communication, the negotiation with which you were charged by my letter of 5th January last, will no longer require your presence in London, the President thinks it proper that you should now proceed to Madrid, and in conjunction with Mr. Pinckney open a negotiation on the important subjects remaining to be adjusted with the Spanish Government. You will understand however that besides the consideration how far your immediate departure may be permitted by the state of our affairs with the British Government or by events unknown at this distance, you are at liberty to make it depend in a due degree on the prospect of active co-operation or favorable dispositions from quarters most likely to influence the Counsels of Spain. It will be of peculiar importance to ascertain the views of the French Government. From the interest which France has in the removal of all sources of discord between Spain and the United States, and the indications given by her present Government of a disposition to favor arrangements for that purpose, particularly in relation to the Territory remaining to Spain on the Eastern side of the Mississippi, and from the ascendency which the French Government has over that of Spain, of which a recent and striking proof has lately been given in the prompt accession of the latter, on the summons of the former to the transfer of Louisiana to the United States, notwithstanding the orders which had been transmitted to the Spanish Envoy here, to protest against the right to make the transfer; much will depend on and much is expected from the interposition of that Government in aid of your negotiations. Mr. Livingston has been instructed to cherish the motives to such an interposition, as you will find by the extract from my letter to him herewith inclosed; and if you should take Paris on your way to Madrid, as is

probable, you will not only be able to avail yourself of all his information, but will have an opportunity of renewing the personal communications which took place during your joint negotiations.

The objects to be pursued are 1st an acknowledgment by Spain that Louisiana as ceded to the United States extends to the River Perdido; 2d A cession of all her remaining territory Eastward of that River including East Florida. 3d. A provision for Arbitrating and paying all the claims of citizens of the United States not provided for by the late Convention, consisting of those for wrongs done prior to the last peace by other than Spanish subjects within Spanish responsibility; for wrongs done in Spanish Colonies by Spanish subjects or officers; and for wrongs of every kind for which Spain is justly responsible, committed since the last peace. On the part of the United States it may be stipulated that the territory on the Western side of the Mississippi shall not be settled for a given term of years, beyond a limit not very distant from that river, leaving a spacious interval between our settlements and those of Spain, and that a sum of —— dollars shall be paid by the United States in discharge of so much of the awards to their citizens. It may also be stipulated or rather may be understood that no charge shall be brought by the United States against Spain for losses sustained from the interruption of the deposit at New Orleans.

The subjoined draught puts into form and into detail the arrangement to which the Pesident authorizes you to accede, relying on your best efforts to obtain better terms, and leaving to your discretion such modifications as may be found necessary, and as will not materially affect the proportion between the gains and the concessions by the United States.

ARTICLE I.

Sec. 1. Spain acknowledging and confirming to the United States the cession of Louisiana in an extent eastwardly to the River Perdido, cedes to them forever all the Territory remain-

ing to her between the Mississippi the Atlantic and the Gulph of Mexico; together with all the Islands annexed thereto, either whilst the Floridas belonged to G. Britain or after they became provinces of Spain.

Or, if the article be unattainable in that form, Spain cedes to the United States forever all the Territory with the Islands belonging thereto, which remain to her between the Mississippi, the Atlantic and the Gulph of Mexico.

Sec. 2. Possession of the said territory shall be delivered to a person or persons authorized by the United States to receive the same within days or less if practicable, after the exchange of the ratifications of this convention. With the said Territory shall be delivered all public property excepting ships and military stores as also all public archives belonging to the provinces comprehending the said Territory.

Sec. 3. Within ninety days after delivery of possession or sooner if possible, the Spanish troops shall evacuate the territory hereby ceded; and if there should be any Spanish troops remaining within any port of the Territory ceded by France to the United States, all such troops shall without delay be withdrawn.

Sec. 4. Spanish subjects within the ceded territory who do not choose to become citizens of the United States shall be allowed 18 months to dispose of their real property and to remove or dispose of their other property.

Sec. 5. The inhabitants of the ceded territory shall be entitled to the same incorporation into the United States and to the same protection in their religion, their liberties and their property as were stipulated to the inhabitants of the Territory ceded to the United States by the Treaty of the 30 April 1803 with the French Republic.

ARTICLE II.

Sec. 1. It is agreed that for the term of years no lands shall be granted, nor shall persons who may have settled since October 1—1800 on lands not granted prior thereto, be

permitted to continue within the space defined by the following limits, to wit, by a limit consisting on one side of the River Sabine or Mexicano from the sea to its source, thence a straight line to the confluence of the Rivers Osages and Missouri; and from the said confluence a line running parrellel with the Mississippi to the latitude of its northernmost source, and thence a maredian to the Northern boundary of Louisiana and by a limit on the other side consisting of the River Colorado (or some other river emptying into the Bay of S$^{t}$ Bernard) from its mouth to its source, thence a straight line to the most Southwestwardly source of the red River with such deflections however as will head all the waters of that river, thence along the ridge of the highlands which divide the waters belonging to the Missouri and Mississippi from those belonging to the Rio Bravo to the latitude of the northernmost source of that river, and thence a maredian to the Northern boundary of Louisiana.

Sec. 2. Such of the settlements within the foregoing limits not prohibited by Article II Sec. 1 as were not under the authority of the Government of Louisiana shall continue under the authority of Spain. Such as were under that authority shall be under the authority of the United States. But the parties agree that they will respectively offer reasonable inducements, without being obliged to use force, to all such settlers to retire from the space above limited and establish themselves elsewhere.

Sec. 3. The Indian tribes within the said limits shall not be considered as subject to or exclusively connected with either party. Citizens of the United States and Spanish subjects shall be equally free to trade with them, and to sojourn among them as far as may be necessary for that purpose; and each of the parties agrees to restrain by all proper and requisite means its respective citizens and subjects from exciting the Indians, whether within or without the said limits, from committing hostilities or aggressions of any sort on the subjects or citizens of the other party. The parties agree more-

over, each of them, in all public transactions and communications with Indians to promote in them a disposition to live in peace and friendship with the other party.

Sec. 4. It shall be free for Indians now within the territories of either of the parties to remove to and settle within the said limits without restraint from the other party; and either party may promote such a change of settlement by Indians within its territories; taking due care not to make it an occasion of war among the Indians, or of animosities in any of them against the other party.

Sec. 5. The United States may establish Garrisons sufficient as security against the Indians and also trading Houses at any places within the said limits where Garrisons existed at any time under the Spanish Government of Louisiana. And Spain may continue Garrisons for the like purpose at any places where she now has them, and establish trading Houses thereat. Either party may also cause or permit any part of the Country within the said limits to be explored and surveyed, with a view to commerce or science.

Sec. 6. It shall be free for either of the parties to march troops within the said limits against Indians at War with them for the purpose of driving or keeping out invaders or intruders.

ARTICLE III.

It is agreed that within years previous to the expiration of the aforesaid term of years due provision shall be made for amicably adjusting and tracing the boundary between the territories of the United States Westward of the Mississippi and the territories of his Catholic Majesty, which boundary shall then be established according to the true and just extent of Louisiana as ceded by Spain to France and by France to the United States; uninfluenced in the smallest degree or in any manner whatever by the delay, or by any arrangement or circumstance contained in or resulting from this Convention.

ARTICLE IV.

Whereas by the 6th article of the Convention signed at Madrid on the 11th day of August 1802 it is provided, that as it had not been possible for the Plenipotentiaries of the two powers to agree upon a mode by which the Board of Commissioners to be organized in virtue of the same should arbitrate the claims originating from the excesses of foreign cruizers, agents, Consuls or tribunals in their respective territories, which might be imputable to their two Governments, &c; and whereas such explanations have been had upon the subject of the Article aforesaid as have led to an accord: It is therefore agreed that the Board of Commissioners to be organized as aforesaid shall have power for the space of eighteen months from the exchange of the ratifications hereof to hear and determine in the manner provided as to other claims in the said Convention all manner of claims of the Citizens and subjects of either party for excesses committed or to be committed by foreign cruizers, Agents, Consuls or tribunals in their respective territories which may be imputable to either Government according to the principles of justice, the law of the nations or the treaties between the powers, and also all other excesses committed or to be committed by officers or individuals of either nation, contrary to justice, equity, the law of nations or the existing treaties and for which the claimants may have a right to demand compensation.

ARTICLE V.

It is further agreed that the respective Governments will pay the sums awarded by the said Commissioners under this Convention and also those which have been or may be awarded under that of the 11th of Aug$^{t.}$ 1802, in manner following.

The Government of the United States will pay all such sums not exceeding in all dollars, which may be

awarded as compensation to citizens of the United States from his Catholic Majesty, in three equal annual instalments at the City of Washington, the first instalment to be paid in eighteen months after the exchange of the ratifications hereof, or in case they shall not be so paid, they shall bear an interest of six pCent p annum from the time when they become due until they are actually discharged, and in case the aggregate of the said sums should not amount to the said sum of dollars the United States will pay to his Catholic Majesty within one year after the final liquidation of the claims cognizable by the said Board, at the City of Washington so much as the said aggregate may fall short of the sum above mentioned; but on the other hand, if the whole amount of the sums awarded to Citizens of the United States should exceed the said sum of dollars, His Catholic Majesty shall pay the surplus without deduction, to such of the claimants and at such times and places as the said Commissioners shall appoint.

The Government of the United States will also pay without deduction, at the City of Washington, all such sums as may be awarded against them by the said Commissioners for compensation due to Spanish subjects at such times as shall be appointed in the awards respectively.

This Convention shall be ratified within days after the signing thereof, and the ratifications shall be exchanged within days after the ratification by the United States, at the City of Washington.

Observations.

The first form of the first Article (paragraph 1) is preferred because it explicitly recognizes the right of the United States under the Treaty of S$^{t}$ Ildefonso and of April 30, 1803, to the river Perdido, which is constructively provided for only, in the second form. It is indispensable that the United States be not precluded from such a construction; first because

they consider the right as well founded; secondly and principally, because it is known that a great proportion of the most valuable lands between the Mississippi and the Perdido have been granted by Spanish Officers since the cession was made by Spain. These illicit speculations cannot otherwise be frustrated than by considering the Territory as included in the cession made by Spain, and thereby making void all Spanish grants of subsequent date. It is represented that these grants have been extended not only to citizens of the United States but to others, whose interest now lies in supporting the claim of Spain to that part of Louisiana in opposition to that of the United States. It is conjectured that Mr. Laussat himself has entered into the speculations, and that he felt their influence in the declaration made confidentially to our Commissioners at New Orleans, that no part of West Florida was included in Louisiana.

In supporting the extent of Louisiana to the Perdido, you will find materals for your use in the extract above referred to and the other documents annexed; to which you will add the result of your own reflections and researches. The secret Treaty between France and Spain ceding Louisiana West of the Mississippi to Spain and which has never been printed may doubtless be obtained at Paris if not at Madrid, and may be of use in the discussion. From the references in the French orders of 1764 for the delivery of the Province, it is presumed to be among the archives of New Orleans and Governor Claiborne has been requested to send a copy of it; but it may not be received in time to be forwarded for your use. In an English work "The Life of Chatham" printed in 1793 for I. S. Gordon, London No. 166 Fleet street, I find a memorial referred to but not there printed with the other negotiations preceding the peace of 1762–3 expressly on the subject of the limits of Louisiana; and as sufficiently appears, with a view to give the province its extent to the Perdido. You will perhaps be able to procure in London or Paris a sight of this document. It probably contains most of the proofs appli-

cable to the question; and will be the more important; as proceeding from France it will strengthen our lien on her seconding our construction of the Treaty. The memorial will be the more important still if it should be found to trace the Western limits also of Louisiana, and to give it a corresponding extent on that side. In page 416 & seq of Vol 1 you will see that fact established that the Floridas including the French part were ceded to Great Britain as the price for the restoration of Cuba, and that consequently the French part now claimed by the United States was a cession purely for the benefit of Spain.

The reasons, beyond the advantages held out in the arrangement itself, which may be addressed to Spain, as prompting a cession of her remaining territory Eastward of the Perdido, will be found in the remarks on the extract aforesaid in the instructions to Mr. Pinckney and yourself of the 17th day of February last, and in those which have from time to time been given to Mr. Pinckney. The Spanish Government cannot but be sensible that the expence of retaining any part of that Territory must now more than ever exceed any returns of profit; that being now more than ever indefensible, it must the more invite hostile expeditions against it from European enemies, and that whilst in her hands, it must be a constant menace to harmony with the United States.

The arrangement proposed in Art. II supposes that Louisiana has a very great extent Westwardly and that the policy of Spain will set much value on an interval of Desert between her settlements and those of the United States.

In one of the papers now transmitted you will see the grounds on which our claim may be extended even to Rio Bravo. By whatever river emptying into the gulph Eastward of that, Spain may with any plausibility commence the Western boundary of Louisiana, or however continue it thence to its Northern limit, she cannot view the arrangement in any other light than that of a concession on the part of the United States to be balanced by an equivalent concession on her part.

The limit to the interval on our side is to be considered as the ultimatum, and consequently not to be yielded without due efforts to fix a limit more distant from the Mississippi. It is highly important also, or rather indispensable, that the limit on the Spanish side should not be varied in any manner that will open for Spanish occupancy any part of the waters connected with the Missouri or Mississippi. The range of high lands separating these waters from those of the Rio Bravo and other waters running Westward presents itself so naturally for the occasion, that you will be able to press it with peculiar force.

To enable you the better to understand the delineations contained in this Article and any others which may be brought into discussion, I forward herewith copies of two Maps and refer you to others, viz– that of Danville which you will find either in London or Paris and if no where else in Postlewaits Dictionary, and a Map by Mr. in 1768 referred to in one of those forwarded. The latter you will doubtless be able to procure at Madrid. The blank for the term of years is not to be filled with more than years nor with that number if a shorter term can be substituted.

The IV and V Articles relate to claims against Spain not provided for by the Convention already entered into and the payment to be assumed by the United States. For the reasoning in support of the claims founded on wrongs proceeding from other than Spanish subjects, I refer you to the letters and instructions of Mr. Pinckney. Your communications with him will also furnish the grounds on which the claims resulting from injuries done to our citizens in the Spanish Colonies are to be maintained. The reasonableness of a residuary provision for all just claims, is implied by the concurrence of Spain in establishing a Board of Commissioners for the cases already submitted to it.

You will not fail to urge on the Spanish Government the VI Article of the Treaty of 1795 as particularly applicable to cases where other than Spanish subjects have committed

spoliations on our vessels and effects within the extent of Spanish jurisdiction by sea or by land. To justice and the law of nations, this adds the force of a positive stipulation which cannot be repelled without proving what cannot be proved, that the Spanish Government used all *the means in its power* to protect and defend the rights of our citizens; and which cannot be resisted without pleading what self respect ought not to permit to be pleaded, that the sovereignty of His Catholic Majesty was under duress from a foreign power within his own dominions.

The sum of money to be paid by the United States is in no event to exced dollars in cash at the Treasury of the United States not in public stock; and is to be applied towards the discharge of awards to our citizens and it is hoped that a much smaller sum will be found sufficient.

If Spain should inflexibly refuse to cede the territory Eastward of the Perdido, no money is to be stipulated. If she should refuse also to relinquish the territory Westward of that river no arrangement is to be made with respect to the Territory Westward of the Mississippi, and you will limit your negotiations to the claim of redress for the cases of spoliation above described.

If Spain should yield on the subject of the Territory Westward of the Perdido and particularly if a comprehensive provision for the claims should be combined therewith, you may admit an arrangement Westward of the Mississippi on the principle of that proposed, with modifications however if attainable varying the degree of concession on the part of the United States according to the degree in which Spain may concur in a satisfactory provision for the cases of the territory westwards of the Perdido, and of the claims of indemnification.

The United States having sustained a very extensive tho' indefinite loss by the unlawful suspension of their right of deposit at New Orleans, and the Spanish Government having admitted the injury, by restoring the deposit it will be fair to avail yourself of this claim in your negotiations, and to let

Spain understand that if no accommodation should result from them it will remain in force against her.

The term of years during which the interval between the settlements of the United States and of Spain, are to be prohibited, is a consideration of great importance. A term which may appear a moment to a nation stationary or slowly advancing in its population will appear an age to a people doubling its population in little more than 20 years, and consequently capable in that time of covering with an equal settlement double the territory actually settled. This reflection will suggest the expediency of abridging the continuance of the prohibition as much as the main objects in view will permit. years are a limit not to be exceeded. Fifteen or even ten, if the space between the Mississippi and the interval territory be not enlarged, seem to be as much as Spain can reasonably expect. She cannot but be sensible, and you will make use of the idea, if you find it prudent so to do, that before a very long term will elapse, the pressure of our growing population with events which time does not fail to produce, but are not foreseen will supersede any arrangements which may now be stipulated, and consequently that it will be most prudent to limit them to a period susceptible of some certain calculations.

No final cession is to be made to Spain of any part of the Territory on this side of the Rio Bravo; but in the event of a cession to the United States of the Territory East of the Perdido and in that event in case of absolute necessity only, and to an extent that will not deprive the United States of any of the waters running into the Missouri or Mississippi, or of the other waters emptying into the Gulph of Mexico between the Mississippi and the river Colorado emptying into the Bay of S$^{t}$ Bernard.

No guarantee of the Spanish possessions is to be admissible. This letter is intended for Mr. Pinckney as well as yourself, and as containing the instructions by which the execution of your joint commission is to be guided.

April 18—The President being absent, and it being most proper to wait his return which may be shortly expected, before any final instructions be given as to your immediate destination, after closing your mission to Spain, I recommend that you do not actually leave London until you hear again from me. The moment the President arrives I will communicate to you his views by multiplied conveyances, that you may receive them with as little delay as possible. In the meantime you will make such preparations as will enable you to come directly from Spain to the United States, in case a call for your services on this side of the Atlantic should lead him to that decision, instead of your return to London.

I have the honor to be, &c

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TO JAMES MONROE AND CHARLES PINCKNEY.

D. OF S. MSS. INSTR.

DEPARTMENT OF STATE July 8th—1804.

GENTLEMEN:

Since the instructions given you on the 15th of April last, further views have been obtained with respect to the interior of Louisiana, and the value which Spain will probably put on such a limitation of our settlements beyond the Mississippi as will keep them for some time at a distance from hers. The President has accordingly become the more anxious that in the adjustment authorized by those instructions the terms may be made favorable to the United States. He does not indeed absolutely restrain you from yielding to the Ultimatum therein fixt, in case it be required by the inflexibility of the Spanish Government and particularly by the posture and prospect of affairs in Europe. But he is not a little averse to the occlusion for a very long period of a very wide space of territory westward of the Mississippi; & equally so to a perpetual relinquishment of any territory whatever Eastward of the Rio Bravo. If this river could be made the limit to

the Spanish settlements and the river Colorado the limit to which those of the United States may be extended; and if a line North West or West from the source of whatever river may be taken for the limit of our settlements, could be substituted for the ultimatum line running from the source of the Sabine to the junction of the Osages with the Missouri and thence Northward parallel with the Mississippi, the interval to be unsettled for a term of years would be defined in a manner peculiarly satisfactory. The degree however in which you are to insist on these meliorations of the arrangement must be regulated by your discretion and by the effect which the probable course of events will have on the temper and policy of Spain. Should she be engaged in the War, or manifestly threatened with that situation, she cannot fail to be the more anxious for a solid accommodation on all points with the United States; and the more willing to yield for that purpose to terms, which, however, proper in themselves might otherwise be rejected by her pride and misapplied jealousy. According to the latest accounts from Great Britain a revolution in the Ministry if not a change on the throne was daily expected, and from either of those events, an extension of the war to Spain, if not precluded by the less probable event of a speedy peace with France would be a very natural consequence. It is to be understood that a perpetual relinquishment of the Territory between the Rio Bravo and Colorado is not to be made nor the sum of dollars paid without the entire cession of the Floridas; nor any money paid in consideration of the acknowledgment by Spain of our title to the Territory between the Iberville and the Perdido. But a proportional sum out of the dollars may be stipulated for a partial cession of territory Eastward of the Perdido. If neither the whole nor part of East Florida can be obtained, it is of importance that the United States should own the Territory as far as the Apalachicola, and have a common, if not exclusive right to navigate that stream. I must repeat that great care is to be taken that the relin-

quishment by Spain of the Territory Westward of the Perdido be so expressed as to give to the relinquishment of the Spanish title, the date of the Treaty of St. Ildefonso. The reason for this was before explained, and is strengthened by recent information as you will find by the annexed extract of a letter from Governor Claiborne. Other proofs might be added. In any further cession of Territory, it may be well so to define it, as to guard as much as possible against grants irregular or incomplete, or made by Spanish Officers in contemplation of such a cession.

On entering into conferences with the Spanish Ministry, you will propose and press in the strongest manner an agreement that neither Spain nor the United States shall during the negotiation strengthen their situation in the Territory between the Iberville and the Perdido, and that the navigation of the Mobille shall not be interrupted. An immediate order from the Spanish Government to this effect, may be represented as of the greatest importance to the good understanding between the two countries; and that the forbearance of the United States this long is a striking proof of their sincere desire to maintain it. If such an order should be declined you will not fail to transmit the earliest information of it; as well as to keep up such representations to that Government on the subject as will impress it with the tendency of so unreasonable and unfriendly a proceeding, to drive the United States into arrangements for balancing the military force of Spain in that quarter and for exerting their right of navigation thro' the Mobille. This navigation is become important or rather essential, and a refusal of Spain to acquiesce in it must commit the peace of the two nations to the greatest hazard. The posture of things there is already extremely delicate and calls for the most exemplary moderation and liberality in both the Governments. As a proof of it, I enclose a correspondence between Governor Claiborne and the Spanish Government, at Pensacola, on the same subject

with that of mine with the Marquis D'Yrujo already transmitted to you.[1]

I have the honor to be &c

TO JAMES MONROE.

D. OF S. MSS. INSTR.

DEPARTMENT OF STATE July 20th 1804.

SIR,

Since my last acknowledgment of your letters I have received those of

I enclose herewith several correspondences with Mr. Merry, Mr. Pichon and the Mayor and Marshal of New York, on certain proceedings of the British frigates Cambrian and Boston, and the sloop of war Driver within and without the harbour of New York. Copies of the documents attached to these correspondences are also enclosed, and therewith a protest stating a subsequent irregularity of a strong complexion committed by the Cambrian on several passengers in an American vessel just before her arrival within the harbour of New York.

No answer having been yet received from Mr. Merry to the two last letters from the Department, I cannot pronounce with certainty on the degree of interposition, which he will employ on the occasion. It cannot be doubted, that he will transmit the case to this Government and it is to be hoped that he will place it in a light favorable to a proper result. It is not the less proper, however, that the sentiments and

[1] On July 18, 1804, he instructed Pinckney:

"The note of February 10 last from Mr. Cevallos [to Pinckney] inclosed in that [Pinckney's] of Feby. 22d withdrawing the objection of Spain to the transfer of Louisiana from France to the United States, makes it proper that you should signify to the Spanish Government, that altho for reasons sufficiently explained the Spanish Government was considered by the United States as absolutely precluded from interposing such an objection, the President receives with satisfaction this act of justice and candor on the part of His Catholic Majesty."—*D. of S. MSS. Instr.*

expectations of this Government should be spoken thro' the Organ of the United States at London, and the President accordingly charges you to make the case, as you will collect it in all its features and colours from the papers above referred to, the subject of a strong tho' temperate representation. It is but justice to the British Government to suppose that it will be struck with the series of enormities which have been committed by its officers against the unquestionable and essential rights of a friendly nation; and will be not only ready to disavow them, but to render all the satisfaction which is due to the United States. In this view it is particularly proper that the appeal to its justice should be in a spirit, temperate, respectful and friendly. On the other hand it is not less due to the United States and to the universal sensibility, which has been excited by the complicated and violent insults received, that the complaint should be presented in its true character, and the claim of ample satisfaction be expressed in terms of becoming dignity and energy. It is the more necessary that this tone should be given to the representation as in several preceding instances of great offence to the national rights and honor, the result of the best founded representations has so little corresponded with our just expectations. The documents of which copies are also inclosed will explain two instances, in one of which one of the frigates in question, the Boston, was the aggressor. The least that can be required in the present instance is that those who have so grossly violated our laws, and eluded the punishment of their guilt, should either be given up to the authority of the United States, or receive from their own Government a punishment which will have the same salutary effect: and the least punishment that can be relied on for the purpose, is that of a bona fide and permanent degradation of the offenders from every public honor or authority. It must be understood that a dismission from their particular offices, accompanied with a translation to any others, as, it is said, has sometimes been done, will not be considered as either just

or candid; and the British Government must also understand, as indeed has been sufficiently intimated to Mr. Merry, that a refusal or failure to make on this occasion, so reasonable an amends to the United States for the outrages offered to them, must be followed by precautions, which, however disagreeable or inconvenient cannot be either blamed or wondered at by those on whom the necessity of them is chargeable.

With these observations the whole subject is committed to your prudent attention; on which the President relies with full confidence for an effectual pursuit of the object of your Government, and a dignified vindication of the rights of your country.

Your answer to the circular communication of Lord Hawksbury was a very proper one. If the lapse of time or other circumstances should render unnecessary any thing further on the part of this Government, it may be best to let the subject remain in silence. Should the omission of a formal reply, be likely to be received as disrespectful, or to be in any degree injurious to subsisting relations, the President authorizes you to assure the British Government that the communication has been received with that sincere and just interest which the United States takes in whatever concerns the British nation, and that the communication, considered as the effect of an honourable solicitude in the British Government to maintain the esteem and confidence of neutral and friendly nations, affords an occasion, of which this Government avails itself with satisfaction, for expressing the unremitted disposition of the United States to cherish all the relations which happily subsist between the two nations; sincerely regretting at the same time every indication of new sources of animosity in addition to the spirit of hostility so unhappily prevailing between Great Britain and France.

I enclose an extract of the instructions to Genl. Armstrong who goes as Successor to Mr. Livingston, containing the

reply authorized to be given to the French Communication. He expects to embark in a few days.

I remain Sir &c

## TO JAMES MONROE.

D. OF S. MSS. INSTR.

DEPARTMENT OF STATE September 12th, 1804.

SIR,

My letter of 20th July made you acquainted with the irregularities committed by British ships of War in and adjoining the harbour of New York, and with the correspondence which had ensued between Mr Merry and myself. I now add copies of the letters which have since passed between us on that subject, with copies of documents since received relating to the same or to subsequent violations of our national rights.[1]

From the letter of Mr Merry and its inclosures, you will discover that instead of promoting a redress of the injuries represented to him, he makes himself an advocate of the authors; and from my reply, that finding such to be the case, it is not proposed to protract the discussion with him. It rests consequently altogether with you to place the subject in the proper light before the British Government, and to press in a proper manner the satisfaction due to the United States from its justice and its friendly policy. In doing this, it need not be repeated that regard is to be had equally to a

[1] He wrote to Merry Sept. 3:

"The several communications & representations to which it is a reply, had for their object to obtain your interposition towards repairing and controuling the irregularities practised by British ships of war in the Harbour of N. York and on the adjoining coasts. The resort was produced by a confidence that proceedings so contrary to public and local law, so irritating in their tendency and so much at variance with the sentiments which your Government is believed to entertain towards the U. States, would have received from you all the discountenance which they seemed to merit. Finding from the

manly tone in stating the complaints, and to a conciliatory respect, in appealing to the motives from which a satisfactory interposition is expected. Mr. Merry has endeavored to construe a candid and friendly intimation of the dilemma to which the United States will be exposed by a continuance of such outrages, into an offensive threat, and will no doubt so present it to his Government. Should the language to which he refers not sufficiently otherwise explain itself, you are authorized to disclaim any intention on our part inconsistent with the respect which the United States owe and profess for the British Government, and which in this case best coincides with the respect which they owe to themselves. It must be recollected at the same time, that the expediency of some provisions against aggressions on our commerce and our harbours was a subject of very interesting deliberation with Congress at their last Session; that it was postponed under

tenor of your letter, and it is found with much regret, that instead of the expected result, charges supported by regular proof against the British Commanders are considered as answered by the denials of the parties; that not only the authority to impress British subjects from American Vessels on the high seas is maintained, but a positive sanction is moreover given to the impressment of British subjects (which includes the decision of questions of allegiance) from British vessels within the acknowledged Sovereignty of the U. States, with an implied Sanction to the extraordinary pretension of a British naval Commander, the Captain of the Cambrian, to a dominion of his Ship over a certain space around it, even when lying in an American port; that the continuance of enemy ships in one of our ports, a continuance which may be prolonged indefinitely at the pleasure of an adequate force, is alledged as a sufficient vindication of the use which continues to be made of the Port by British ships, and of their proceedings in its vicinity to which that use is made subservient: finding, in a word that the view which you have been pleased to take of the complaints addressed to you, appears to be calculated rather to fortify than to restrain the British Commanders, in the course which they are pursuing; it is not perceived that any advantage is promised by the further discussion which might result from entering into the particular comments of which some of your observations are susceptible. It is deemed more proper to indulge the expectation that the subject will be seen by the Councils of his Britannic Majesty in a light more satis-

a hope that such provisions would be rendered unnecessary by the just and amicable regulations of the belligerent powers; and that it is more than probable that a disappointment in this particular can scarcely fail to revive the subject at the next Session. These considerations are too important not to be brought into view in your communications with the British Government; and you will know how and when to do it with the least risk of irritation, and consequently with the greatest probability of useful effect.

I have the honor to be &c

## TO JAMES MONROE.

D. OF S. MSS. INSTR.

DEPARTMENT OF STATE October 11th 1804.

SIR,

I have the honor to transmit to you a copy of a letter from Thomas Manning with the document it inclosed, respecting the capture of the Brig Camillus and what appears to be a most unprovoked outrage committed on the person of Thomas Carpenter, a native of the United States, then a seaman on board, by order of Lieutenant Sutton, commanding the British armed schooner L'Eclair or Leclerc. Mr. Manning has been informed that recompence for the loss he has sustained must be attempted by his pursuing the judicial remedy against Mr. Sutton, if he thinks it advisable. But the reparation demanded by the honor of our flag whose immunities have

factory to the U. States, and more correspondent with the disposition to cherish all the friendly relations which so happily exist between the two Nations, and which are so strongly recommended by their mutual interests.

"The irregularities charged on the French ships of War now at N. York, were first notified to the Government by your representations on that head. You may assure yourself, Sir, that they will be enquired into with that attention which the U. States owe not only to their own jurisdiction; but to their neutral position, to which they will always be as ready to pay respect themselves, as to insist on it from others." —*Mad. MSS.*

been so grossly violated in the person of Carpenter by an officer of the King of Great Britain is the serious concern of the Government, and you will therefore apply for satisfaction in that decided yet friendly manner which is warranted by the highly aggravated conduct of the British officer. The circumstances of the occurrence, though almost incredible from their nature, are as fully supported as can be done by *ex parte* evidence, which nevertheless Mr. Manning assures me is free from colouring and exaggeration. It will therefore not be a satisfactory answer to the complaint to be presented with the bare denial of Mr. Sutton if he should hazard one; for if the British Government think the harmony of the United States worth preserving they ought to scrutinize with care and punish with rigor misconduct which has such an irritating tendency.

I have the honor to be &c

## TO NOAH WEBSTER.[1]

WASHINGTON, Oct. 12, 1804.

SIR—

I received, during a visit to my farm, your letter of Aug. 20, and hoped that I should, in that situation, find leisure to give it as full an answer as my memory and my papers would warrant. An un-

[1] From *A Collection of Papers on Political Literary and Moral Subjects*. By Noah Webster, LL.D. New York, 1843; p. 169.

Webster's letter to which this is a reply is dated New Haven, August 20, 1804, deplores Hamilton's death, and regrets that his eulogists have given him some credit not his due. Dr. Mason has declared the "original germ" of the Constitution "was in the bosom of Hamilton," and that he suggested the idea of a radical change at the Annapolis convention. Webster calls attention to his pamphlet *Sketches of American Policy* eighteen months before the Annapolis convention and says: "I have always understood and declared that you made the first proposal, and brought forward a resolve for the purpose, in the House of Delegates of Virginia, in the session of December, 1785. In

foreseen pressure of public business, with a particular one of private business interesting to others as well as to myself, having disappointed me, I find myself under the necessity of substituting the few brief remarks which return to the occupations of this place, and the absence of my papers, will admit.

I had observed, as you have done, that a great number of loose assertions have at different times been made with respect to the origin of the reform in our system of federal government, and that this has particularly happened on the late occasion which so strongly excited the effusions of party and personal zeal for the fame of Gen. Hamilton.

The change in our government like most other important improvements ought to be ascribed rather to a series of causes than to any particular and sudden one, and to the participation of many, rather than to the efforts of a single agent. It is certain that the general idea of revising and enlarging the scope of the federal authority, so as to answer the necessary purposes of the Union, grew up in many minds, and by natural degrees, during the experienced inefficacy of the old confederation. The discernment of Gen. Hamilton must have rendered

this I am confident of being correct, for I was in Richmond at that time. If wrong, please to set me right.

"Mr. Paine claims to be the first mover of the proposal for a national government, alledging that he suggested it to some friends in the year 1784 or 1785. Mr. Pelatiah Webster wrote a pamphlet on the subject of a different frame of government in 1784." Webster's *Collection* &c. 168.

See Madison's introduction to the *Journal of the Constitutional Convention, ante*, Vol. II, p. 391.

him an early patron of the idea. That the public attention was called to it by yourself at an early period is well known.

In common with others, I derived from my service in the old Congress during the latter stages of the Revolutionary war, a deep impression of the necessity of invigorating the federal authority. I carried this impression with me into the legislature of Virginia; where, in the year 1784, if my recollection does not fail me, Mr. Henry co-operated with me and others in certain resolutions calculated to strengthen the hands of Congress.

In 1785, I made a proposition with success in the legislature of the same state, for the appointment of commissioners to meet at Annapolis such commissioners as might be appointed by other states, in order to form some plan for investing Congress with the regulation and taxation of commerce.[1] This I presume to be the proceeding which gave you the impression that the first proposal of the present constitution was then made. It is possible that something more might have been the subject of conversation, or may have been suggested in debate, but I am induced to believe that the meeting at Annapolis was all that was regularly proposed at that session. I would have consulted the journals of it, but they were either lost or mislaid.

Although the step taken by Virginia was followed by the greater number of the states, the attendance at Annapolis was both so tardy and so deficient, that

[1] See, however, Madison's letter to Webster of March 10, 1826, *post*.

nothing was done on the subject immediately committed to the meeting. The consultations took another turn. The expediency of a more radical reform than the commissioners had been authorized to undertake being felt by almost all of them, and each being fortified in his sentiments and expectations by those of others, and by the information gained as to the general preparation of the public mind, it was concluded to recommend to the states a meeting at Philadelphia, the ensuing year, of commissioners with authority to digest and propose a new and effectual system of government for the Union. The manner in which this idea rose into effect, makes it impossible to say with whom it more particularly originated. I do not even recollect the member who first proposed it to the body. I have an indistinct impression that it received its first formal suggestion from Mr. Abraham Clark of New Jersey. Mr. Hamilton was certainly the member who drafted the address.

The legislature of Virginia was the first I believe, that had an opportunity of taking up the recommendation, and the first that concurred in it. It was thought proper to express its concurrence in terms that would give the example as much weight and effect as possible; and with the same view to include in the deputation, the highest characters in the state, such as the governor and chancellor. The same policy led to the appointment of Gen. Washington, who was put at the head of it. It was not known at the time how far he would lend himself

to the occasion. When the appointment was made known to him, he manifested a readiness to yield to the wishes of the legislature, but felt a scruple from his having signified to the Cincinnati, that he could not meet them at Philadelphia, near about the same time, for reasons equally applicable to the other occasion. Being in correspondence with him at the time and on the occasion, I pressed him to step over the difficulty. It is very probable that he might consult with others, particularly with Mr. Hamilton, and that their or his exhortations and arguments may have contributed more than mine to his final determination.

When the convention as recommended at Annapolis took place at Philadelphia, the deputies from Virginia supposed, that as that state had been first in the successive steps leading to a revision of the federal system, some introductory propositions might be expected from them. They accordingly entered into consultation on the subject, immediately on their arrival in Philadelphia, and having agreed among themselves on the outline of a plan, it was laid before the convention by Mr. Randolph, at that time governor of the state, as well as member of the convention. This project was the basis of its deliberations; and after passing through a variety of changes in its important as well as its lesser features, was developed and amended into the form finally agreed to.

I am afraid that this sketch will fall much short of the object of your letter. Under more favorable

circumstances, I might have made it more particular. I have often had it in idea to make out from the materials in my hands, and within my reach, as minute a chronicle as I could, of the origin and progress of the last revolution in our government. I went through such a task with respect to the declaration of independence, and the old confederation, whilst a member of Congress in 1783; availing myself of all the circumstances to be gleaned from the public archives, and from some auxilliary sources. To trace in like manner a chronicle or rather a history of our present constitution, would in several points of view be still more curious and interesting; and fortunately the materials for it are far more extensive, Whether I shall ever be able to make such a contribution to the annals of our country, is rendered every day more and more uncertain.

I will only add that on the slight view which I have taken of the subject to which you have been pleased to invite my recollections, it is to be understood, that in confining myself so much to the proceedings of Virginia, and to the agency of a few individuals, no exclusion of other states or persons is to be implied, whose share in the transactions of the period may be unknown to me.

With great respect and esteem, I remain, sir,

Your most obedient servant,

TO JAMES MONROE.

D. OF S. MSS. INSTR.

DEPARTMENT OF STATE March 6th 1805.

SIR,

My last general letter was dated the 26th of October, and sent in sundry copies both to London and Madrid, it not being then certain at which of those places it would find you. The letters since received from you are of October 15th & December 20th. From Mr. Purviance a letter has also been received of October 19th.

The procrastinations of the British Ministry in meeting you effectively, on the subjects proposed in your project for a Convention, betray a repugnance to some of them, and a spirit of evasion, inauspicious to a satisfactory result. Still your conduct was prudent, in winking at this dilatory policy, and keeping the way open for a fair and friendly experiment on your return from Madrid, which it is presumed will have taken place before this will reach London. The experience of every day, shows more and more the obligation on both sides, to enter seriously on the means of guarding the harmony of the two countries against the dangers with which it is threatened by a perseverance of Great Britain in her irregularities on the high seas, and particularly in the impressments from American vessels. The extent in which these have taken place since the commencement of the War, will be seen by the inclosed report required from this Department by a vote of the House of Representatives, and the call for it whilst negotiations on the subject were understood to be in train, is itself a proof of the public sensibility to those aggressions on the security of our citizens and the rights of our flag. A further proof will be seen in the motion also inclosed, which was made by Mr. Crowninshield, and which will probably be revived at the next Session. This motion with his remarks on it, appear very generally in the newspapers, with comments proceeding from a coincidence of the sensibility out of doors with that within. A still stronger proof of impatience

under this evil, will be found in the proceedings authorized by an Act of Congress just passed and which is likewise inclosed, against British Officers committing on the high seas trespasses or torts on board American vessels; offences manifestly including cases of impressment.

In communicating these circumstances it will occur to you that whilst they may be allowed to proclaim the growing sensibility of the United States on the subject of impressments, they ought, by proper explanations and assurances to be guarded against a misconstruction into marks of illiberal or hostile sentiments towards Great Britain. The truth is, and it may be so stated by you, that this practice of impressments, aggravated by so many provoking incidents has been so long continued, and so often, in vain remonstrated against, that without more encouragement than yet appears, to expect speedy redress from the British Government, the United States are in a manner driven to the necessity of seeking for some remedy dependent on themselves alone. But it is no less true that they are warmly disposed to cherish all the friendly relations subsisting with Great Britain; that they wish to see that necessity banished by just and prudent arrangements between the two Governments; and that with this view you were instructed to open the negotiations which are now depending. It is impossible for the British Government to doubt the sincerity of these sentiments. The forbearance of the United States year after year, and war after war, to avail themselves of those obvious means which without violating their national obligations of any sort, would appeal in the strongest manner, to the interest of Great Britain, is of itself a sufficient demonstration of the amicable spirit which has directed their public councils. This spirit is sufficiently manifested also, by the propositions which have been lately made thro' you, and by the patience and cordiality with which you have conducted the negotiation. I might add, as a further proof to the same effect, that notwithstanding the refusal of which we have official information, from Glasgow

and Liverpool particularly, to restore American seamen deserting their ships in British ports, the laws of many of the States have been left, without interruption, to restore British deserters. One of the States, Virginia, has even at the last Session of its Legislature, passed an Act for the express purpose of restoring such deserters; which deserves the more attention, as it was done in the midst of irritations resulting from the multiplied irregularities committed by British ships in the American seas.

Mr. Merry has expressed some inquietude with respect to the clause in the Act above referred to, which animadverts on British trespasses on board American vessels; and his language on several late occasions has strongly opposed the expectation that Great Britain will ever relinquish her practice of taking her own subjects out of neutral vessels. I did not conceal from him my opinion that the terms "trespass &c" would be applicable to the impressment of British subjects as well as others, or that the United States would never accede to that practice. I observed to him that every preceding administration had maintained the same doctrine with the present on that point; and that such were the ideas and feelings of the Nation on it, that no administration would dare so far surrender the rights of the American flag. He expressed dissatisfaction also at the section which requires certain compliances on the part of British ships of War entering our harbours, with arrangements to be prescribed by the Collectors. He did not deny the right of the Nation to make what rules it might please in such cases; but apprehended that some of them were such as the Commanders might deem incompatible with their just pretensions, especially when subjecting them to the discretion of so subaltern an authority as that of the Collectors; and consequently, that the law would have the unfriendly effect of excluding British ships of War altogether from American ports. He was reminded, in reply, that the Collectors were, according to the terms of the section, to be guided in the exercise of their

power by the directions of the President; and it was not only to be presumed, but he might be particularly assured, that the directions given would be consistent with the usages due to public ships, and with the respect entertained for nations in amity with the United States. He asked whether in transmitting the Act to his government, as his duty would require, he might add the explanation and assurances he had heard from me. I answered, that without having received any particular authority for that purpose from the President, I could safely undertake that what I had stated was conformable to his sentiments.

Inclosed is another Act of Congress restraining and regulating the arming of private vessels by American citizens. This Act was occasioned by the abuse made of such armaments in forcing a trade, even in contraband of war, with the Island of St. Domingo; and by the representations made on the subject of that trade by the French Chargé des Affaires and Minister here, and by the British Minister with respect to abuses which had resulted or might result from such armaments in cases injurious to Great Britain. A report of these representations as made to the President is herewith inclosed. The Act, in substituting a security against the unlawful use of the armaments in place of an absolute prohibition of them; is not only consistent with the obligations of a neutral nation, but conformable to the laws[1] and ordinances of Great Britain and France themselves, and is consequently free from objections by either. The interposition of the Government tho' claimed in behalf both of Great Britain and of France, was most pressed in behalf of the latter. Yet the measure, particularly as it relates to the shipment of contraband Articles for the West Indies, is likely to operate much more conveniently for Great Britain than for France, who cannot like Great Britain otherwise ensure a supply of these Articles for the defence of her Colonies.

[1] See Act of Parliament 35 G., 3 C., 92 S., 37–38 and Nalins' *Commentaries Liv.* 1. Tit. 10, Art. 1.—*Note in the Original.*

(In the project which you have offered to the British Government I observe you have subjoined a clause for securing respect to certificates of citizenship. The effect of this clause taken as it ought to be & as was doubtless intended, in context with the preceding clause, is limited to the case provided for in that clause. Still it may be well in order to guard against the possibility of its being turned into a pretext for requiring such certificates in other cases, that a proviso for the purpose be added, or that words of equivalent restriction be inserted.

I find also that you have considered it as expedient to drop altogether the 4th Article contained in the project transmitted to you. It would certainly be better to do this than to listen to such an Article concerning provisions as Sweden was induced by the little interest she has in that branch of trade, to admit into her late Treaty with Great Britain. It is certainly, in a general view, ineligible also to strengthen by positive stipulations the doctrine which subjects to confiscation, enemies property in neutral vessels. It appears to the President nevertheless, that this consideration is outweighed by the great advantages which would be gained by the Article, and by the sanction which the United States have already given to that doctrine. It can scarcely be presumed that France would complain of such an Article when seen in its real shape. The immunity given to naval stores, and the security given to the trade of her Colonies, including the supplies essential to them, would seem to render such an Article particularly desirable to her. For this reason among others it is not probable that the British Government would have ever acceded to the Article even as making a part of the general arrangement; and more so that it will be rejected on its intrinsic merits. I have thought it proper, however, to make you acquainted with the view which the President has of the subject, that you may pursue it as far as any opportunity may present itself.)

Another subject requiring your attention is pointed at by the Resolutions of the Senate moved by General Smith on

the subject of a British Tax on exports under the name of a Convoy duty. A copy of the Resolution is inclosed. A duty under that name was first laid in the year 1798. It then amounted to p. of one P. Cent on exports to Europe; and one P Cent on exports to other places, and consequently to the United States. The discrimination being evidently contrary to the Treaty then in force, became a subject of discussion between Mr. King and the British Ministry. His letters to the Secretary of State and to Lord Grenville explain the objections urged by him and the pretexts in support of the measure alleged by them. The subject was resumed in my letter of 5th March 1804 to Mr. King with a copy of which you have been already furnished. It was received by Mr. Gore during the absence of Mr. King on the Continent; and if any occasion was found proper by either for repeating the remonstrance against the duty, it appears to have been without effect. Whilst the Treaty was in force the discrimination was unquestionably a violation of its faith. When the War ceased, it lost the pretext that it was the price of the Convoy, which giving a larger protection to the American than to the European trade, justified a higher price for the former than for the latter. Even during war the exports are generally made as American property and in American vessels, and therefore with a few exceptions only, a convoy which would subject them to condemnation, from which they would otherwise be free, would be not a benefit but an injury. Since the expiration of the Treaty, the discrimination as well as the duty itself can be combated by no other arguments than those, which in the document referred to are drawn from justice, friendship and sound policy; including the tendency of the measure to produce a discontinuance of the liberal but unavailing example given to Great Britain by the regulations of commerce on our side, and a recurrence to such counteracting measures as are probably contemplated by the mover of the Resolutions of the Senate. All these arguments gain strength in proportion to the augmentations

which the evil has latterly received; it being now stated that the duty amounts to 4 P Cent on the exports to the United States. These, according to Cockes answer to Sheffield amounted in the year 1801 to about 7 Millions sterling and therefore levy a tax on the United States of about 1,300,000 dollars. From this is indeed to de deducted a sum proportional to the amount of re-exportations from the United States. But on the other hand, is to be added, the increase of the exports since the year 1801 which probably exceed the re-exportations.

With the aid of these communications and remarks, you will be at no loss for the views of the subject most proper to be presented to the British Government, in order to promote the object of the Resolutions; and the resolutions themselves ought powerfully to second your efforts, if the British Government feels the same desire as actuates the United States to confirm the friendship and Confidence on both sides, by a greater conformity on that side to the spirit of the Commercial regulations on this.

I have referred above to the inclosed copy of the motion made by Mr. Crowninshield in the House of Representatives. The part of it which has relation to the trade with the West Indies, was suggested as appears in his introductory observations by the late proclamations of the British West India Governors, excluding from that trade vessels of the United States, and certain Articles of our exportations particularly fish, even in British vessels. These regulations are to be ascribed partly to the attachment of the present administration in Great Britain to the Colonial and Navigation system, partly to the interested representations of certain merchants and others residing in the British Provinces on the Continent. Without entering at large into the policy on which the Colonial restrictions are founded, it may be observed that no crisis could be more ineligible for enforcing them, than the present, because at none more than the present, have the West Indies been absolutely dependent on the United States

for the supplies essential to their existence. It is evident in fact that the United States by asserting the principle of a reasonable reciprocity, such as is admitted in the trade with the European ports of Great Britain, and as is admitted even in the Colonial trade of other European Nations, so far at least as respects the vessels employed in the trade, might reduce the British Government at once to the dilemma of relaxing her regulations or of sacrificing her Colonies: and with respect to the interdict of supplies from the United States of Articles necessary to the subsistence and prosperity of the West Indies, in order to force the growth and prosperity of the Continental provinces of Nova Scotia &c; what can be more unjust than they to impoverish one part of the foreign dominions which is considered as a source of wealth and power to the parent country, not with a view to favor the parent country but to favor another part of its foreign dominions, which is rather expensive than profitable to it? What can be more preposterous than thus at the expence of Islands which not only contribute to the Revenue, commerce and navigation of the parent state, but can be secured in their dependence by that Naval ascendancy which they aid, to foster unproductive establishments which from local causes must eventually detach themselves from the parent state and the sooner in proportion as their growth may be stimulated.

Considerations, such as these ought to have weight with the British Government, and may very properly enter into frank conversations with its Ministry on favorable occasions. However repugnant that Government may be to a departure from its system in the extent contemplated by Mr. Crowninshield's motion, it may at least be expected that the trade as opened in former wars, will not be refused under circumstances which in the present, particularly demand it: it may be hoped that the way will be prepared for some permanent arrangement on this subject between the two Nations, which

will be conformable to equity, to reciprocity and to their mutual advantage.

I have the honor to be &c

TO JAMES MONROE

D: OF S. MSS. INSTR

DEPARTMENT OF STATE April 12th 1805

SIR,

The papers herewith inclosed explain particularly the case of the Brig Aurora.

The sum of the case is, that whilst Spain was at War with Great Britain, this vessel, owned by a citizen of the United States, brought a cargo of Spanish produce purchased at the Havana, from that place to Charleston, where the cargo was landed, except an insignificant portion of it, and the duties paid or secured, on a like cargo from whatever port, meant for home consumption; that the cargo remained on land about three weeks when it was reshipped for Barcelona in old Spain, and the duties drawn back, with a deduction of three and a half p cent as is permitted to imported articles in all cases, at any time within one year under certain regulations which were pursued in this case; that the vessel was taken on her voyage by a British cruizer and sent for trial to Newfoundland where the cargo was condemned by the Court of Vice Admiralty; and that the cause was carried thence by appeal to Great Britain where it was apprehended that the sentence below would not be reversed.

The ground of this sentence was, and that of its confirmation if such be the result, must be, that the trade in which the vessel was engaged was unlawful; and this unlawfulness must rest, first on the general principle assumed by Great Britain, that a trade from a Colony to its parent Country, being a trade not permitted to other Nations in time of peace, cannot be made lawful to them in time of war; secondly, on

the allegation that the continuity of the voyage from the Havana to Barcelona was not broken by landing the cargo in the United States paying the duties thereon and thus fulfilling the legal pre-requisites to a home consumption; and therefore that the cargo was subject to condemnation, even under the British regulation of Jany 1798 which so far relaxes the general principle as to allow a direct trade between a belligerent Colony and a neutral Country carrying on such a trade.

With respect to the general principle which disallows to neutral Nations in time of War, a trade not allowed to them in time of peace, it may be observed;

First, that the principle is of modern date, that it is maintained, as is believed by no other nation but Great Britain; and that it was assumed by her under the auspices of a maritime ascendency, which rendered such a principle subservient to her particular interest. The History of her regulations on this subject shows that they have been constantly modified under the influence of that consideration. The course of these modifications will be seen in an appendix to the 4th Vol of Robinsons Admiralty Reports.

Secondly, that the principle is manifestly contrary to the general interest of commercial Nations, as well as to the law of Nations, settled by the most approved authorities, which recognizes no restraints on the trade of nations not at war, with nations at war, other than that it shall be impartial between the latter, that it shall not extend to certain military articles, nor to the transportation of persons in military service, nor to places actually blockaded or besieged.

Thirdly, that the principle is the more contrary to reason and to right, inasmuch as the admission of neutrals into a Colonial Trade shut against them in times of peace, may, and often does result from considerations which open to neutrals direct channels of trade with the parent state shut to them, in times of peace, the legality of which latter relaxation is not known to have been contested; and inasmuch as a commerce

may be, and frequently is opened in time of war, between a Colony and other Countries, from considerations which are not incident to the war, and which would produce the same effect in a time of peace; such, for example as a failure or diminution of the ordinary sources of necessary supplies, or new turns in the course of profitable interchanges.

Fourthly, That it is not only contrary to the principles and practice of other Nations; but to the practice of Great Britain herself. It is well known to be her invariable practice in time of war, by relaxations in her navigation laws, to admit neutrals to trade in channels forbidden to them in times of peace; and particularly to open her Colonial trade both to Neutral vessels and supplies, to which it is shut in times of peace; and that one at least of her objects, in these relaxations is to give to her trade an immunity from capture, to which in her own lands it would be subjected by the war.

Fifthly, the practice, which has prevailed in the British dominions, sanctioned by orders of Council and an Act of Parliament (39 G. 3 C. 98) authorizing for British subjects a direct trade with the enemy, still further diminishes the force of her pretensions for depriving us of the Colonial trade. Thus we see in Robinson's Admiralty reports passim, that during the last war a licenced Commercial intercourse prevailed between Great Britain and her enemies, France, Spain & Holland, because it comprehended articles necessary for her manufactures and agriculture, notwithstanding the effect it had in opening a vent to the surplus productions of the others. In this manner she assumes to suspend the war itself as to particular objects of trade beneficial to herself whilst she denies the right of the other belligerents to suspend their accustomed commercial restrictions in favour of Neutrals. But the injustice and inconsistency of her attempt to press a strict rule on neutrals is more forcibly displayed by the nature of the trade which is openly carried on between the Colonies of Great Britain and Spain in the West Indies. The mode of it is detailed in the inclosed copy of a letter from

a Mr. Billings, wherein it will be seen that American vessels and cargoes, after being condemned in British Courts under pretence of illicit commerce, are sent on British account to the enemies of Great Britain, if not to the very port of the destination interrupted when they were American property. What respect can be claimed from others to a doctrine not only of so recent an origin and enforced with so little uniformity, but which is so conspicuously disregarded in practice by the Nation itself, which stands alone in contending for it?

Sixthly—It is particularly worthy of attention that the Board of Commissioners jointly constituted by the British and American Governments under the 7th Article of the Treaty of 1794, by reversing condemnations of the British Courts founded on the British instructions of Novem. 1793, condemned the principles that a trade forbidden to neutrals in time of peace, could not be opened to them in time of war; on which precise principle these instructions were founded. And as the reversal could be justified by no other authority than the law of nations, by which they were to be guided, the law of Nations according to that joint Tribunal, condemns the principle here combatted. Whether the British Commissioners concurred in these reversals, does not appear; but whether they did, or did not, the decision was equally binding, and affords a precedent which could not be disrespected by a like succeeding tribunal, and ought not to be without great weight with both Nations in like questions recurring between them.

On these grounds the United States may justly regard the British captures and condemnations of neutral trade with Colonies of the enemies of Great Britain as violations of right; and if reason, consistency or that sound policy which cannot be at variance with either, be allowed the weight which they ought to have, the British Government will feel sufficient motives to repair the wrongs done in such cases by its cruizers and Courts.

But, apart from this general view of the subject, a refusal

to indemnify the sufferers, in the particular case of the Aurora, is destitute of every pretext; because in the second place, the continuity of her voyage was clearly and palpably broken, and the trade converted into a new character.

It has been already noted that the British regulation of 1798, admits a direct trade in time of War, between a belligerent Colony and a neutral Country carrying on the trade; and admits consequently the legality of the importation by the Aurora from the Havana to Charleston. Nor has it ever been pretended that a neutral Nation has not a right to re-export to any belligerent Country whatever foreign productions, not contraband of war, which may have been duly incorporated and naturalized, as a part of the Commercial stock of the Country re-exporting it.

The question then to be decided under the British regulation itself, is whether in landing the cargo, paying the duties, and thus as effectually qualifying the articles for the legal consumption of the Country, as if they had been its native production, they were not at the same time equally qualified with native productions, for exportation to a foreign market. That such ought to be the decision results irrestably from the following considerations:

1st From the respect which is due to the internal regulations of every Country, where they cannot be charged with a temporizing partiality towards particular belligerent parties, or with fraudulent views towards all of them. The regulations of the United States on this subject, must be free from every possible imputation; being not only fair in their appearance, but just in their principles, and having continued the same during the periods of war, as they were in those of peace. It may be added that they probably correspond, in every essential feature relating to re-exportations, with the laws of other Commercial Countries, and particularly with those of Great Britain. The annexed outline of them by the Secretary of the Treasury, will at once explain their character, and

shew that, in the case of the Aurora, every legal requisite was duly complied with.

2d From the impossibility of substituting any other admissible criterion, than that of landing the Articles, and otherwise qualifying them for the use of the Country. If this regular and customary proceeding, be not a barrier against further enquiries, where it may be asked are the enquiries to stop? By what evidence are particular articles to be identified on the high seas, or before a foreign Tribunal? If identified, how is it to be ascertained, whether they were imported with a view to the market whether to one forbidden or permitted by the British regulations; for it is to be recollected, that among the modifications which her policy has given to the general principle assented by her, a direct trade is permitted to a neutral carrier, from a belligerent Colony to her ports, as well as to those of his own Country. If, again, the landing of the goods, and the payment of the duties be not sufficient to break the continuity of the voyage, what it may be asked, is the degree of internal change or alienation, which will have that effect? May not a claim be set up to trace the articles from hand to hand, from ship to ship in the same port, and even from one port to another port, as long as they remain in the Country? In a word in departing from the simple criterion provided by the Country itself, for its own legitimate and permanent objects, it is obvious, that besides the defalcations which might be committed on our carrying trade, pretexts will be given to cruizers for endless vexations on our commerce at large, and that a latitude and delays will accrue in the distant proceedings of Admiralty Courts, still more ruinous and intolerable.

3d From the decision in the British high Court of Admiralty itself, given in the case of the Polly, Lasky, Master, by a Judge deservedly celebrated for a profound judgment, which cannot be suspected of leaning towards doctrines unjust or injurious to the rights of his own Country. On that occasion he expressly declares "It is not my business to say

what is universally the test of a bona fide importation: it is argued, that it would not be sufficient that the duties should be paid and that the cargo should be landed. If these criterias are not to be resorted to, I should be at a loss to know what should be the test; and I am strongly disposed to hold, that it would be sufficient, that the goods should be landed and the duties paid." 2 Rob. Reports P. 368–9.

The President has thought it proper that you should be furnished with such a view of the subject, as is here sketched; that you may make the use of it best suited to the occasion. If the trial of the Aurora should not be over it is questionable whether the Government will interfere with its Courts. Should the trial be over and the sentence of the Vice Admiralty Court at St. John's have been confirmed, you are to lose no time in presenting to the British Government a representation corresponding with the scope of these observations; and in urging that redress in the case, which is equally due to private justice, to the reasonable expectation of the United States, and to that confidence and harmony which ought to be cherished between the two Nations.

The effect of the doctrine involved in the sentence of the Court in Newfoundland, on our carrying trade, will at once be seen by you. The average amount of our re-exportations for three years ending 30th Sept. 1803, has been 32,003,921 dollars. Besides the mercantile and Navigation profits, the average revenue from drawbacks on goods re-exported for three years ending 31st Dec. 1803 is 184,271 dollars; to which is to be added an uncertain but considerable sum consisting of duties paid on articles re-exported after having lost thro' neglect or lapse of time, the privilege of drawback. A very considerable portion of this branch of trade with all its advantages, will be cut off, if the formalities heretofore respected are not to protect our re-exportations. Indeed it is difficult to see the extent to which the apprehended innovation may be carried in theory; or to estimate the mischief which it may produce in practice. If Great Britain disregarding the pre-

cepts of Justice, suffers herself to calculate the interest she has in spoliating or abridging our commerce, by the value of it to the United States, she ought, certainly not to forget that the United States must in that case, calculate by the same standard, the measures which the stake will afford, for counteracting her unjust and unfriendly policy.

I have the honor to be &c

## TO JOHN ARMSTRONG.

D. OF S. MSS. INSTR.

DEPARTMENT OF STATE June 6th 1805.

SIR,

On reviewing the letters from you not yet acknowledged, I find them under the following dates viz 12th November, 24, 25 & 30th Decem. 14th Feby. and 18th March last.

I have the pleasure to observe to you that the President entirely approves the just and dignified answer given to the venal suggestions emanating from the French functionaries as explained in your letter of the 24th December. The United States owe it to the world as well as to themselves to let the example of one Government at least, protest against the corruption which prevails. If the merit of this honest policy were questionable, interest alone ought to be a sufficient recommendation of it. It is impossible that the destinies of any Nation, more than of an individual, can be injured by an adherence to the maxims of virtue. To suppose it, would be to arraign the justice of Heaven, and the order of nature. Whilst we proceed therefore in the plain path which those maxims prescribe, we have the best of securities that we shall, in the end, be found wiser than those crooked politicians, who regarding the scruples of morality as a weakness in the management of public affairs, place their wisdom in making the vices of others, the instruments of their own.

Previous to the receipt of your last letters inclosing copies of your two to Mr. Monroe, the communications from Madrid

had given us a view of the unfavorable posture which the negotiations with Spain was taking. The extract now inclosed, of the answer which is gone to Madrid, will shew the turn which it is thought most expedient to give to the negotiation, in case its general object should fail, and will enable you to manage your communications with the French Government with a more distinct reference to the course of things at Madrid. This is the more necessary, as it is evident that the Spanish Government must derive its boldness and its obstinacy, from the French Cabinet. The part which France takes in our controversies with Spain, is not a little extraordinary. That she should wish well to her ally, and even lean towards her, in the terms of an adjustment with the United States, was perhaps to be expected. But that she should take side wholly with Spain, and stimulate pretensions, which threatening the peace of the two countries might end in placing the United States on the side of Great Britain, with resentments turned against France as the real source of their disappointment, this is more than was to be expected, and more than can easily be explained. If the Imperial cabinet be regardless of the weight which this Country could add to the British scale, it is a proof that the prospects in Europe are extremely flattering to its views. If the object be, as you finally conjecture, and as on the whole seems least improbable, merely to convert the negotiations with Spain into a pecuniary job for France and her Agents, the speculation altho' pushed with a singular temerity, may finally be abandoned under a despair of success, and yield to the obvious policy of promoting equitable arrangements between Spain and the United States.

Whatever the views of France may be, there is little ground to rely on the effect of an appeal to right or to reasoning in behalf of our claims on Spain. Were it otherwise it would seem impossible for her to withhold her acquiescence in them. Not to repeat what has been sufficiently urged in the communications you already possess, it may be observed that

nothing can be more preposterous than the joint attempt now made by the French and Spanish Governments in discussing the boundaries of Louisiana, to appeal from the text of the Convention which describes them, to a secret understanding or explanations on that subject between those Governments. France sold us Louisiana as described in the Deed of conveyance, which copies the description from the Deed of Spain to France. If France sold more than she had a right to sell, she would at least be bound to supply the deficiency by a further purchase from Spain, or to remit protanto, the price stipulated by us. But the case rests on a still better footing. France assigned to us Louisiana as described in the Conveyance to her from Spain. Our title to the written description is therefore good against both, notwithstanding any separate explanation or covenant between them, unless it be shewn that notice thereof was given to the Uinted States before their bona fide purchase was made. This is a principle of universal justice, no less than of municipal law. With respect to France it will scarcely be pretended that any such notice was given. On the contrary she corroborated our title according to the text of the bargain by the language of Mr. Tallyrand to Mr. Livingston; she corroborated our particular construction of the Text, in relation to the Eastern boundary of Louisiana by the language of Mr. Marbois; and she corroborated our construction in relation to both Eastern and Western boundaries by her silence under the known extent to which that construction carried them. And with respect to Spain, who is equally bound by the assignment of the ostensible title of France, unless she can prove a notice to the United States that the real title was different from the ostensible one, it is to be observed, first, that no such proof has ever been attempted; and next, that Spain cannot even pretend an ignorance of the necessity of such notice. This is evinced by her conduct in another instance where a secret stipulation with France, contrary to the tenor of her Treaty with France, was alledged in opposition to the Treaty of the

United States with France. France it appears had promised to Spain, thro' her Minister at Madrid, that she would in no event alienate the Territory ceded to her by Spain. The Spanish Government sensible that this promise could not invalidate the meaning of the instrument, which exhibited the title of France as absolute and therefore alienable, no sooner heard of the purchase concluded at Paris by the Ministers of the United States, than she instructed her Minister at Washington to communicate without delay to the Government of the United States the alledged engagement of France not to alienate. This communication was made on the 9th of Sept. 1803; and so convinced was Spain of the necessity of the most formal notice on such occasions, that the Spanish Minister here repeated the same notice on the 27th of the same month, with the addition of some other pretended defects in the title of France, and urged on the Government here an obligation to forbear under such circumstances to ratify the Convention with France. Now if it was necessary for Spain, in order to protect herself by a secret engagement of France not to alienate, against the overt transaction giving France a right to alienate, that she should give notice of that engagement to third parties; and if Spain knew this to be necessary the same course was equally necessary and equally obvious, when the effect of the overt stipulation as to the limits of the Territory sold was to be arrested or restricted by any separate agreement between the original parties. Yet this course has not been pursued. So far from it, Spain, in finally notifying thro' her Minister here, a relinquishment of her opposition to the assignment of Louisiana to the United States, and consequently to the title of France as derived from the Treaty itself never gave the least intimation of any other secret articles or engagements whatever, which were to qualify the exposition of the overt description of boundaries contained in the text of the Treaty; fully acquiescing thereby in the meaning of

the text according to the ordinary rules of expounding it.[1]

In your letter of Feby. 14th, it is intimated that a disposition appeared in the French Government to open the Colonial Trade to the U. States, in consideration of a pecuniary equivalent. The objections to such an arrangement are considered by the President as insuperable. If made in time of War, it would beget discontents in Great Britain who would suspect or pretend that the arrangement was a cover for a subsidy; and with the more plausibility, as during war, nearly the same privileges are allowed without purchase. The precedent, in the next place, would be a novel and a noxious one. Add that our trade with the French Colonies, in time of war, being more important to France than to the United States, there is as much reason why she should buy it

[1] Madison wrote to Livingston July 5:

"The communications from Gen[l] Armstrong are not later than May 4. Those from Madrid are of about the same date. They concur in shewing that Spain struggles much ag[st] our demands, & that France has her views in embarrassing if not defeating the negociation. What the end will be remains to be seen. Altho' appearances are not flattering, is there not some room to calculate, that When France finds she cannot get her hand into our pocket, and that our disputes with Spain may involve herself, & throw the U. S. into the British Scale, she will, unless events should place her above all such considerations. promote an adjustment of our affairs with her ally? Whether Madrid or Paris be the Theatre, the issue, it would seem, equally depends on the influence, or rather authority over the Spanish Cabinet."—*Mad. MSS.*

To G. W. Erving, chargé at Madrid, he wrote November 1, 1805:

"Dear Sir By M[r] Smith to whom this is committed you will receive the public letter in which the course approved by the P. is marked out for your conduct at Madrid. The grounds for it are strengthened by the posture of things in Europe, and by the approach of the Session of Cong[s] The impression made on this Country by the proud & perverse conclusion given by Spain to the endeavours of M[r] M. & M[r] P. to adjust our differences, ought if faithfully reported to her, to teach her a lesson salutary at all times & particularly so at the

of us in time of war, as that we should buy it of her in time of peace. Finally, the reciprocity of advantages in the Trade at all times, makes it the real interest of France as of other nations, to lay it open to us at all times. Of this truth, the enlightened Statesmen of Europe are becoming every day more sensible; and the time is not distant when the United States with a reduced debt, and a surplus of revenue, will be able, without risking the public credit, to say with effect, to whatever nation they please, that they will shut their trade with its Colonies in time of war, if it be not opened to them equally at all times.

Still the peculiar situation of St. Domingo makes it desirable that some such arrangement should take place as is suggested in my letters to Mr. Livingston of 31st Jany & 31 March 1804, extracts from which are inclosed. And the late Acts of Congress, having done what ought to be followed by proofs of a corresponding disposition on the part of France, the President thinks it proper that you should not lose sight of that object. It is thought proper also, that you should continue to press on favorable occasions the reasonableness of permitting Commercial Agents of the United States to reside wherever a commerce is permitted.

present moment. She may be sure that she will never better her stipulations with this Country by delay. If she calculates on the friend at her elbow, or be jogged by him into follies not altogether her own, she is so far to be pitied or despised, as she avails herself of such explanations. But here again she receives a lesson from the scene which appears to be opening in Europe agst the Imperial career of France. England seems as ready to play the fool with respect to this Country as her enemies. She is renewing her depredations on our Commerce in the most ruinous shapes, and has kindled a more general indignation among our Merchts than was ever before expressed. How little do those great nations in Europe appear, in alternately smiling and frowning on the U. S., not according to any fixed sentiments or interests, but according to the winds & clouds of the moment. It will be the more honorable to the U. S. if they continue to present a contrast of steady and dignified conduct, doing justice under all circumstances to others, and taking no other advantage of events than to seek it for themselves."—*Mad. MSS.*

You have already been apprized of the depredations committed by the lawless cruizers of France in the West Indies; sometimes in connection with French ports; sometimes in connection with Spanish ports. This subject claims the serious attention of the French Government; as laying the foundation for just claims of indemnity, as well as producing irritations unfriendly to the relations prescribed by the interest and it is hoped by the dispositions of both Countries. In some instances great irregularities are committed, beyond those of mere depredation. Inclosed is a statement of a peculiar outrage, and of the letter written to Turreau on the subject with his answer. France cannot give a more acceptable proof of her justice, nor a more seasonable one of her sound policy, than by provisions that will effectually remove such grounds of complaint.

I inclose also a copy of a very extraordinary decree issued by the French Commandant at Santo Domingo. The letter written by Genl. Turreau, of which a copy, with one of his in answer, is inclosed, will explain the sentiments of the President thereon, and be a guide to the representations which you will make to the French Government. I add a copy of a letter to the President from Mr. Walton residing at Santo Domingo, which, having, relation to our affairs with that Island may assist your view of them. There is no reason to believe that under the decree of Genl. Ferrand any of our Citizens have been put to death; but it seems certain that they have suffered the indignity and the outrage of corporal punishment, and consequently that an exemplary satisfaction is due from the French Government, at least, in cases which fall not under municipal law but that of Nations. Genl. Turreau, you will observe, undertakes to vindicate the justice of the bloody decree, at the same time that he promises to interpose against its effects. It was thought unnecessary to reply to his answer, which would have brought on a fruitless and endless discussion, and the more unnecessary as the principles maintained by the United States, with respect

to the trade with St. Domingo, were sufficiently understood.

In the course of last month sailed for the Mediterranean, a reinforcement consisting of the frigate John Adams of 32 Guns and 600 men, 9 Gun boats carrying each about 20 men and most of them two thirty two pounders, and two bomb vessels with 13 inch Mortars. The boats are of a size and structure supposed to be much superior to any yet known in that sea, and to be peculiarly fitted for the service in which they are to be employed.

Mr. Bowdoin sailed from Boston about the 10th of last Month, in the Baltic, Cap Blount for St. Andero.

The laws of the last Session of Congress being just edited, a copy is transmitted by this opportunity.

I have the honor to be &c

## TO JAMES MONROE.

D. OF S. MSS. INSTR.

(*Private*).

PHILADELPHIA September 24th 1805.

DEAR SIR:

The decision of the Admiralty Courts of Great Britain disallowing the sufficiency of landing and paying duties on Colonial produce of belligerent Colonies, re-exported from ports of the United States to protect the produce against the British Cruizers and Courts, has spread great alarm among the merchants, and has had a grievous effect on the rate of insurance. From the great amount of property afloat subject to this new and shameful depredation, a dreadful scene of distress may ensue to our commerce. The subject was brought to attention by the case of the Aurora, which gave rise to the observations and instructions contained in my letter of the 12th of April last. I omitted in that letter to refer you to a case in Blackstone's reports, where Lord Mansfield says "that it was a rule settled by the Lords of

appeal, that a transhipment off a neutral port, was equivalent to the landing of goods from an enemy's Colony, and that in the case of a landing there could be *no color* for seizure." As Mr. King's correspondence may not be in London, I think it not amiss to remind you of what passed with the British Government in 1801 in consequence of such seizures as are now sanctioned. A copy of the doctrine transmitted by the Government to the Vice Admiralty Courts as the law for their guidance is enclosed. If such a condemnation out of their own mouths has no effect, all reasonings will be lost; and absolute submission, or some other resort in vindication of our neutral rights, will be the only alternative left.

I hope you will have received the instructions above referred to, and that your interposition will have had a good effect. I am engaged in a pretty thorough investigation of the original principle, to which so many shapes are given, namely, "that a trade not open in peace is not lawful in War"; and shall furnish you with the result as soon as my researches are digested. If I am not greatly deceived, it will appear that the principle is not only against the law of nations, but one which Great Britain is precluded from assuming by the most conclusive facts and arguments derived from herself. It is wonderful that so much silence has prevailed among the neutral authors on this subject. I find scarcely one that has touched on it; even since the predatory effects have been known to all the world. If you can collect any publications, which can aid in detecting and exposing the imposture, be so good as to send them.

I have been here eight weeks with Mrs. Madison, who was brought hither in order to have the assistance of Dr. Physic, in curing a complaint near her knee; which from a very slight tumor had ulcerated into a very obstinate sore. I believe the cure is at length effected, and that I shall be able to set out in a few days for Washington. The President is to be there on the 2nd of October. I postpone all reflections of a public nature until I can communicate the result of his cabinet

consultations. Mrs. Madison presents her affectionate respects to Mrs. Monroe.

I have the honor &c. &c.

## TO JOHN ARMSTRONG AND JAMES BOWDOIN.[1]

D. OF S. MSS. INSTR.

DEPARTMENT OF STATE March 13th 1806.

GENTLEMEN,

I have duly received from time to time your several letters bearing dates 3 July 10 & 15 Aug^t. 10 Sep^t. 3 & 25 Oct & 26 Nov.

Previous to the arrival of Mr. Skipwith with your dispatches of Sept. 10th our affairs with Spain had undergone the particular consideration of the President; with a reference as well to the change in the state of things in Europe, as to the approaching Session of Congress; and it had been determined that the manner in which the negotiations at Madrid had been closed by Spain, forbade any application whatever to her for a renewal of them; 2d that the case should be presented to Congress for such provisions as it might be thought to require on their part; 3d That in the mean time you should be charged to place before the French Government, the necessity to which Spain by refusing to concur in a diplomatic adjustment of her controversies with the United States, had reduced the latter of seeking justice by those ulterior measures which the occasion called for. It had also been determined by the President, that with a view to enable the French Government, if it should be so disposed, to hasten by its mediating influence on Spain the change in her Councils necessary to an amicable adjustment with the United States, and to bring Spain forward for the purpose, that you should be furnished with the terms which Spain might obtain from the U States.

[1] They were appointed jointly envoys to Spain March 17, 1806, but conducted the negotiations in Paris and did not go to Madrid.

On the receipt of your communications by Mr. Skipwith the ideas disclosed by the French Government were considered as forming a sufficient basis for an anticipating provision by Congress, such as was made in reference to the Convention of the 30 April 1803, and it was accordingly determined in pursuance of that example to await the meeting of Congress and lay the subject before them. This was done, and the Act and Resolutions of which copies are inclosed were the result of their discussions; a result which has been delayed by the forms of proceeding, and some variances of opinion on the occasion longer than might have been wished.

I now inclose the outline and substance of a Conventional arrangement adapted to the views expressed by Congress, and such as the President authorizes you to conclude. You will lose no time in imparting it to the French Government in the manner you may deem most expedient; letting it know, at the same time that no direct communication on the subject has been made to the Spanish Government; that after the reception given by Spain to the overtures made thro' an Extraordinary Mission to Madrid, followed by her Military and menacing indications within and near the controverted territories as explained in the annexed extracts, the United States tho' ready to meet Spain in negotiation under the auspices of a common friend do not consider it belonging to them to Court a further negotiation in any form; that consequently the steps necessary on the part of Spain must be the result either of her own reflections or of the prudent counsel which France may undertake to give her.

The President leaves to your own management the expression of those sentiments, which without any improper condescensions on the part of the United States will best conciliate the French Government to our objects. The ascendency which it will have over that of Spain, if no change of circumstances intervene, and the preference of an Amicable termination of our differences with Spain, to an appeal to

force, require that every honorable use should be made of the occasion which seems to offer itself.

Should the Emperor still be absent, without authority in any hands at Paris to take measures in concert with you for instituting the business, it must remain with you to decide according to the probable course of his movements on the most expedient and expeditious mode of holding the necessary communications with his Cabinet. Rather than risque a delay which may lose a favorable crisis, it may be even desirable to repair to his military quarters. This is a step, however, to which there may be so many objections, that it will require very strong considerations to recommend it.

As soon as any authority at Paris shall be ready on the part of Spain, you will enter on the subject and press it to a conclusion with as much celerity and decision as circumstances will justify. The terms stated as your guide require little explanation more than accompanies the several articles. The object with the United States is to secure West Florida which is essential to their interests and to obtain East Florida which is important to them; procuring at the same time equitable indemnities from Spain for the injuries for which she is answerable; to all which the proposed exchange of territory and arrangement of the Western boundary may be made subservient. The desire manifested by the House of Representatives in the Resolution herewith inclosed that such an exchange and arrangement may be found sufficient, without any price in money, will engage all your attention and exertions. If the exchange stated in the Resolution, with the Sabine River for our Western boundary below the ridge dividing the Waters running into the Mississippi from those running into the gulph Westward of the mouth of that river can be obtained, the exchange will be satisfactory, especially if accompanied with a reasonable provision for the indemnities due from Spain to Citizens of the United States. If the exchange can be obtained even without this last provision or without, including the territory Eastward of the Perdido,

or any pecuniary payment for the territory Westward thereof, it is not to be rejected; but in that case it will be extremely desirable to make the authorized establishment of an interval of territory not to be settled for a given period, subservient to a provision for indemnities.

In order to determine the price and the payments to Spain for the Cession of Territory, and to provide indemnities for the Spoliations and other injuries for which Spain is responsible, you will add to the preceding articles, others proper on those subjects. For the several modifications which will best comport with the conveniency of our Treasury and the sentiments of the Secretary of that Department, I refer to copies of a letter and paper from him herewith inclosed; stating to you generally for your guide 1st That the sum to be made payable to Spain for the Cession is not to exceed millions of dollars. 2d That as little as possible, and in no event more than two millions are to be paid prior to the delivery of possession or the ratification. 3d That as ample a provision as possible be made for indemnities either by constituting a Board of Commissioners for settling them or by a sum in gross sufficient to cover their probable amount which is not less than four millions of dollars, and distributable by the United States to such claimants and in such proportions as may be decided under their authority. This last mode of providing for the object will be much the best, if the sum in gross be equal to the amount of claims likely to be allowed by a Board of Commissioners. 4th It is particularly desirable that in defining the cases to be indemnified the terms should be such as will embrace those where French subjects or Citizens, as well as those where Spanish subjects were the wrong doers. If a sum in gross be stipulated, it may be expected that Spain will not object to a definition which will authorize the U. States to apply it to both cases, especially if terms be chosen which will not expressly designate the contested French cases. 5 In defining the cases it will be proper to have in view those of

any description which exist, more particularly depredations on the high seas, and unjust or unlawful injuries within the Spanish jurisdiction whether in old Spain or her Colonies; in a word all injurious Acts either to the United States or to their Citizens, for which the Spanish nation is responsible according to the principles of justice, equity, treaty or the law of nations.

I have the honor to be &c

P. S. Particular care must be taken in case a Convention shall be made which does not provide for the Spoliations or for the portion of them subsequent to the Convention of Augt. 1802, to guard against an abandonment either express or constructive of the just claims of our Citizens on that account.

## PROJECT OF A CONVENTION.

The United States and His Catholic Majesty being desirous of terminating amicably all controversies now subsisting between them, and of providing more effectually for the maintainance of their future harmony, have appointed, &c.

Art. I.

Spain acknowledging and confirming to the United States West Florida, cedes to them forever the same and East Florida with the Islands and Waters thereon respectively depending. (Or if unattainable in that form)

Observations on Art. I.

The object in these forms of expressing the Cession is to date that of West Florida, as far at least as to the perdido from the date of the Cession of Louisiana by France and thereby invalidate the intervening sales of

Spain cedes and confirms forever to the United States East & West Florida with the Islands and waters thereon respectively depending.

Art. II.

Possession of the said Territory shall be delivered to a person or persons authorized by the United States to receive the same within

days or less, if practicable, after the exchange of the ratifications of this Convention. With the said Territory shall be delivered all public property excepting ships and military stores, as also all public archives belonging to the same.

Sec. 2 Within 90 days after delivering possession, or sooner if possible, the Spanish troops shall evacuate the territory hereby ceded.

land, which it is understood have taken place corruptly or unfairly to a very great extent. If Spain should appear to acquiesce in a more explicit acknowledgment of our right under the French Convention as far as to the Perdido, it may be well to divide the territory Eastward of the Mississippi by a reference to that river instead of referring to it as divided into East and West Florida.

Sec. 3 The inhabitants of the ceded territory shall be entitled to the same incorporation into the United States, and to the same protection in their religion, their liberties and their property, as were stipulated to the inhabitants of the territory ceded to the United States by the Treaty of the 30th April 1803 with the French Republic.

Sec. 4 With the same motives in view which led to the VII & VIII Articles of the Treaty above mentioned, it has been agreed between the contracting parties, that the ships of France and Spain shall enjoy in the ports of the hereby ceded territory, until the term of the twelve years therein mentioned shall be expired, the same privileges as to trade and duties as are therein stipulated; and during the same space of time no other nation shall have a right to the same privileges in the ports of the hereby ceded territory.

Sec. 5. In future and forever after the expiration of the said term of 12 years the vessels of Spain shall be

treated upon the footing of the most favored nations in the ports of the hereby ceded territory.

Art. III.

The boundary between the territory of the United States on the Western side of the Mississippi and the possessions of Spain shall be the Colorado (or the Guadaloupe if attainable) from its mouth to its most northerly source, thence a right line to the nearest high-lands, inclosing all the Waters running directly or indirectly into the Mississippi or Missouri, and along the said high lands as far as they border on the Spanish dominions.

Observations.

Altho' it may not be amiss to urge the claim of the U States to the Rio-bravo, and to propose that for the boundary, it is not expected that one more Westwardly than the boundary delineated in this Article will be favored by France or admitted by Spain.

Art. IV.

It is agreed that a space extending thirty leagues on each side of the said boundary shall be kept by the parties respectively unsettled for the term of years

Or

That a space of 30 leagues on the side of the U. States shall be unsettled for the term of

Observations.

These descriptions of a barrier interval are to be successively yielded, according as Spain may be willing to cede therefor her territory Eastward of the Mississippi, or to abate in the sum of money to be paid for East Florida, or to be liberal in her engagements and provisions for indemnifying our

Or

A space between the said boundary and some boundary beginning with a river Eastward of the Colorado & Westward of the Sabine

Or

A space between the said boundary and the boundary beginning with the Sabine and running thence from the source of the Sabine a straight line to the confluence of the Rivers Osages and Missouri, and from the said confluence a line running parrallel with the Mississippi to the latitude of its northernmost source and thence a meridian to the Northern boundary of Louisiana.

Art. V.

(Here was inserted a copy of the provisions contained in the project of 1804 as to the interval not to be settled.)

Citizens. It being impossible to foresee the various modifications and combinations which the subject may take in the course of negotiation, much must necessarily be left to your own judgment. It is to be understood that in no event the Country Eastward of the Sabine and the line from its source as above referred to is to be included in the unsettled interval.

## TO JOHN ARMSTRONG.

D. OF S. MSS. INSTR.

DEPARTMENT OF STATE, March 15th, 1806.

SIR,

I herewith inclose an Act of Congress just passed on the subject of the Commerce with St. Domingo. In prohibiting

the commerce in unarmed as well as armed vessels, the Act goes beyond the obligation of the United States under the law of nations; but the measure was deemed expedient for the present and the eventual welfare of the United States. And altho' it must be understood to have proceeded from that consideration, and not from any rightful requisition on the part of France, and still less from a manner of pressing it, which might have justly had a contrary tendency, yet as it cannot fail to be in itself grateful to the French Government, it may perhaps furnish you with an auspicious occasion for presenting anew the view of the subject committed to your predecessor in a letter of the 31 Jany 1804, from which an extract is inclosed. According to the information received from Mr. Livingston, there was a time when that view of the subject would have prevailed, but for the exasperating effect produced by the armed and forced trade carried on by American Citizens. A trade under certain regulations in articles of subsistence on our side, and in the productions of the Island on the other, seems to be so obviously favorable to the true interests of France, that a dispassionate reconsideration of such an arrangement may be reasonably expected to recommend it to an enlightened Government.

The improper conduct of the Marquis D'Yrujo, the Spanish Minister, in writing and publishing the papers herewith inclosed, is communicated to you with a view that you may correct any misstatements which may find their way to the French Government. It is the more fit that you should be acquainted with the case, as there is ground to believe that pains will be taken by him to convey to that Government an impression that the dislike to him here proceeds from his vigilance and fidelity in counterworking objects of the United States disagreeable to France as well as to Spain. Nothing more can be necessary any where to excite the strongest disapprobation of his proceedings than a fair statement of them. The rudeness of his letters to the Department of State, and his repeated appeals to the people against their Government,

with his attempt to seduce a punter[1] into a confederacy with him in the project, would have justified, and with most other Governments have produced a more rigorous treatment than the moderation of this Government has inflicted. That you may have the fuller view of his demerits, I add to the other papers relating to him, an extract from the letter to our Ministers at Madrid on the subject of his recall.

About three months ago Genl Miranda arrived in the United States, coming last from England. Soon after his arrival he made a visit to this City, where he was treated with the civilities refused to no stranger having an ostensible title to them. Whilst here he disclosed in very general terms his purpose of instituting a revolution in a portion of Spanish America, without adding any disclosure from which it could be inferred that his project had the patronage or support of any foreign power. His communication was merely listened to, with an avowal at first on his part that nothing more was expected. It became evident, however, that he had taken into view the possibility of a rupture between the United States and Spain, and that some positive encouragement would have been peculiarly welcome to him. He was expressly told that altho' the Government of the United States were free to hear whatever he might chuse to impart to it, yet that as they were in amity with Spain and neutral in the war, nothing would be done in the least inconsistent with that sincere and honorable regard to the rules imposed by their situation, which they had uniformly preferred and observed; and that if a hostile conduct towards Spain should at any time be required by her conduct towards the United States, it would take place not in an underhand and illicit way, but in a way consistent with the laws of war, and becoming our national character. He was reminded that it would be incumbent on the United States to punish any transactions within their jurisdiction which might according to the law of nations involve an hostility against Spain, and that a

[1] So in the original: probably junto is meant.

statute of Congress had made express provision for such a case. This particular admonition was suggested by an apprehension that he might endeavor to draw into his enterprize individuals adapted for it, by their military experience and personal circumstances. It was never suspected that the enlistment of a military corps of any size would be thought of. As to the exportation of arms on the occasion, the Act of Congress of the last Session, was considered as both effectual and going beyond the injunctions of the law of nations. It was at the same time also suspected that a bill before Congress prohibiting altogether the exportation of arms from the United States, would have passed and been put in force, before any shipment could have been made of those articles.

Under the effect of this explanation which he professed to understand, and promised strictly to keep in view, he left Washington for New York, the port at which he had arrived, and lately intimations were received by the Executive from private sources that an Armed ship belonging to an American Citizen had been engaged by Genl Miranda for a secret expedition, that cannon and other military stores, and even a company of military recruits were on board with a presumed destination to some part of Spanish America. Without waiting for either evidence of the facts, which has not to this day been received from any quarter, or even a representation of them from Officers of the United States, and before a complaint was received from any foreign Agent whatever, the President gave immediate directions for instituting the legal proceedings applicable to the case. A few days after this step was taken, the occurrence became the subject of a diplomatic correspondence, of which copies are inclosed, and which carried with it, its own explanation. It is proposed to make the last letter from Genl Turreau the subject of a friendly conversation, in which he will be led to understand that without denying his right to interpose as far as France may have a common interest with Spain, it is deemed not only most proper that he should not be a mere organ of d'Yrujo

with whom all direct communication has been closed, but that in other respects it would be more agreeable to the United States to view him in the relation of a common friendship to them and to Spain, than as apparently taking side with the latter.

Having thus put you in full possession of an incident which may possibly have consequences interesting to France as well as to Spain, you will be able to guard the reputation and responsibility of the United States against any perverted views of what has passed, into which attempts may be made to mislead the French Government.

To the documents inclosed on the preceding subjects, I add others which will make you acquainted with the recent occurrences and present state of things at New Orleans. Your own judgment will suggest any use which it may become proper to make of the information.

I have the honor to be &c

## AN EXAMINATION OF THE BRITISH DOCTRINE,

### WHICH SUBJECTS TO CAPTURE

### A NEUTRAL TRADE, NOT OPEN IN TIME OF PEACE.[1]

In times of peace among all nations, their commercial intercourse is under no other restrictions than what may be imposed by their respective laws, or their mutual compacts. No one or more nations can justly control the commerce between any two or more of the others.

When war happens between any two or more nations, a question arises, in what respect it can affect the commerce of nations not engaged in the war?

[1]This essay was written by Madison in 1806, and published anonymously in Washington towards the close of the year. There was no effort to conceal the authorship, however.

Between the nations not engaged in the war, it is evident that the commerce cannot be affected at all by a war between others.

As a nation not engaged in the war remains in the same relations of amity and of commercial pursuits, with each of the belligerent nations, as existed prior to the war, it would seem that the war could not affect the intercourse between the neutral and either of the belligerent nations; and that the neutral nation might treat and trade with either, or both the belligerent nations, with the same freedom as if no war had arisen between them. This, as the general rule, is sufficiently established.

But inasmuch as the trade of a neutral nation with a belligerent nation might, in certain special cases, affect the safety of its antagonist, usage, founded on the principal of necessity, has admitted a few exceptions to the general rule.

Thus, all instruments of war, going into the hands of one belligerent nation, may be intercepted, on the high seas, by its adversary.

In like manner, a neutral trade with a place actually besieged is liable to be interrupted by the besiegers.

It is maintained also on one side, though strongly contested on the other, that the property of a nation at war, in a neutral ship, may be seized and condemned by the enemy of that nation.

To these exceptions, Great Britain has undertaken to add another, as important as it is new. She asserts a right to intercept the trade of neutrals with her enemies, in all cases, where the trade, as it respects the ship, the cargo, or even the individual port of destination, was not as free before the war, as it is made during the war.

In applying this doctrine, the British government and courts have not, as yet, extended it beyond the trade of neutrals on the coasts, and with the colonies of enemies. But it is manifest, that this limitation is founded in considerations of expediency only; and that the doctrine is necessarily applicable

to every other branch of neutral commerce with a belligerent nation, which was not open to the same nation in time of peace. It might indeed with equal reason be extended farther. It might be applied to the case of a trade legally permitted to foreign nations in time of peace, but not *actually* carried on by them in time of peace; because in time of peace actually carried on by the nation itself; and which is taken up by foreign nations in time of war only, in consequence of the war, which, by increasing the risk or by finding other employment for the vessels and seamen of the nation itself, invites neutral traders into the deserted channels. In both cases, the neutral intervention may be said to result from the pressure of the war; and in both cases, the effect is the same to the belligerent; since in both, neutrals carry on for him, a trade auxiliary to his prosperity and his revenue, which he could no longer carry on for himself; and which at the same time, by liberating his naval faculties for the purposes of war, enables him to carry on the war, with more vigor and effect. These inferences cannot be impaired by any sound distinction, between a trade of foreigners with colonies, and a trade of foreigners with the ports of the mother country. Colonies, more especially when they are altogether subject to the same authority which governs the parent state, are integral parts of the same dominion or empire. A trade, therefore, between a colonial port and a port of the parent or principal State, is precisely of the same nature with a trade between one and another port of the latter: and a trade between a colony and a foreign port is, in like manner, precisely the same with the trade between a foreign port and the parent country; which is only a more considerable, as a colony may be a less considerable, part of the same country or empire. Previous to the late political union of Ireland with Great Britain, the relation between those two islands was strictly analogous to the relation between Great Britain and the West Indies. Was any difference ever entertained between a coasting trade from a British to a British port, and a trade from a British to an Irish port? or

between a trade from a foreign port to an Irish port, and a trade from a foreign to a British port? In the nature of things, and in the eye of foreign nations, the cases were the same. If any difference existed, it was merely circumstantial, such as may be incident to all cases essentially the same; or merely municipal, such as may result from those regulations of trade, which all sovereigns have an acknowledged right to make. It would not be unfair, therefore, in examining the doctrine asserted by Great Britain, to view it in the whole extent of which it is susceptible. But the latitude in which it is avowed, and carried into operation, sufficiently demands the serious attention of all nations; but more than any, that of the United States, whose commerce more than any is the victim to this belligerent pretension. To prepare the way for this examination, several remarks are to be premised.

First. The general rule being, that the trade between a neutral and belligerent nation is as free as if the latter were at peace with all nations, and the cases in which it is not as free being exceptions to the general rule, the exceptions, according to a received maxim of interpretation, are to be taken strictly, against those claiming the benefit of the exceptions, and favorably for those claiming the benefit of the general rule.

Secondly. The exceptions being founded on a principle of necessity, in opposition to ordinary right, the necessity ought to be evident and urgent. In proportion as the necessity may be doubtful, and still more, in proportion as the sacrifice of neutral interests would exceed the advantage to the belligerent, the exception fails.

Thirdly. The progress of the law of nations, under the influence of science and humanity, is mitigating the evils of war, and diminishing the motives to it, by favoring the rights of those remaining at peace, rather than of those who enter into war. Not only are the laws of war tempered between the parties at war, but much also in relation to those at peace.

Repeating then, that every belligerent right to controul neu-

tral commerce must, as an exception to the general freedom of commerce, be positively and strictly proved, and the more strictly, as the exceptions are in a course of restriction rather than extension, the question is ready for examination, whether it be a part of the law of nations, that a trade ordinarily shut in time of peace, and opened to neutrals in time of war, on account of the war, is liable, as much as a trade in contraband of war or with a blockaded port, to capture and condemnation.

It will not be overlooked, that the principle, as thus laid down, does not extend to any of the cases, where a new trade, though opened during a war, is not opened *on account* of the war, but on considerations which would produce the same measure, if no war existed: from which follows another important observation, that taking into view the probable occurrence of such considerations, the still greater probability of a mixture of such with considerations derived from the war, the impossibility of distinguishing the proportion of these different ingredients in the mixture, with the evident disadvantage of rendering more complicated, instead of simplifying, a rule of conduct between independent nations, to be expounded and enforced by one of the parties themselves, it would seem to require no great effort of candor, to acknowledge the powerful objection in practice, to such a principle, were it really embraced by the most specious theory.

But without dwelling on this view of the subject, however just in itself, the principle in question will be tried:

First—by the writings most generally received as the depositaries and oracles of the law of nations;

Secondly—by the evidence of treaties;

Thirdly—by the judgment of nations, other than Great Britain;

Fourthly—by the conduct of Great Britain herself;

Fifthly—by the reasoning employed in favor of the principle.

First. The written authorities on this subject.

It cannot be necessary to examine the historical fragments

which have been gleaned by modern authors, as evidence of the usage and tenets of the civilized nations of antiquity. The great change which has taken place in the state of manners, in the maxims of war, and in the course of commerce, make it pretty certain, that either nothing would be found relating to the question, or nothing sufficiently applicable, to deserve attention in deciding it. There is but little hazard in saying, that in none of the learned collections, is a single fact presented, which countenances the British pretension; or even shews, that a single ancient nation asserted or acted on it.

On a cursory review of the naval laws of Rhodes, of Oleron, of Wisbuy, and of the Hanse Towns, they appear to be perfectly barren of information. They are confined to subjects within the law-merchant, taking no notice of questions between nations; and are no further binding on particular nations, than [as] they may be respectively adopted into their municipal codes.

The ancient compilation under the title of Consolato del Mare, a work of great authority with British jurists, has two chapters which treat particularly of captures and recaptures. They do not, however, touch any cases but those where either the ship or the cargo, in whole or in part, might be enemy's property; and consequently are inapplicable to the case under examination.*

Descending to more modern times, the first authority which offers itself, is the work of Albericus Gentilis.

He was the immediate precursor of Grotius, and has the merit of preparing the way for the great work supplied by the genius and erudition of the latter. Gentilis being so soon eclipsed by a superior authority, is but little known beyond a few occasional citations, which, as far as they may not coincide with the doctrines of Grotius, are, for the most part, superseded by them.

*Azuni has given a very learned account of these ancient compilations, particularly of the Consolato del Mare, which he considers as a work of the Pisans, during the period of their maritime prosperity.

Grotius is not unjustly considered, as in some respects, the father of the modern code of nations. Great, however, as his authority deservedly may be, it yields, in a variety of instances, to that of later jurists; who, to all the lights furnished by this luminary, have added those derived from their own sources, and from the improvements made in the intercourse and happiness of nations.

On the relations between belligerent and neutral nations, Grotius has but a single, and that a short chapter, (B. III, Ch. 17,) with three short sections, Ch. 1, sec. 5, of the same book with a note, and B. II, Ch. 2, sec. 10, and B. III, Ch. 6, sec. 6, with a note.* The chapter begins with following paragraph:

"It may seem needless for us to treat of those that are not engaged in war, when *it is manifest that the right of war cannot affect them:* but because upon occasion of war, many things are done against them *on pretence of necessity;* it may be proper here briefly to repeat what we have already mentioned† before, that the necessity must be *really extreme*, to give any right to another's goods: that it is requisite that the proprietor be not himself in the like necessity. When real necessity urges us to take, we should then take no more than what it requires; that is, if the bare keeping of it be enough, we ought to leave the

* The extracts in the text are from the English edition and translation of Grotius, which is in general loose, and sometimes erroneous. It was inserted before there was an opportunity of comparing it with the original.

"Supervacuum videri posset agere nos de his, qui extra bellum sunt positi, quando in hos satis constet nullum esse jus bellicum. Sed quia occasione belli multa in eos, finitimos præsertim, patrari solent prætexta necessitate, repetendum hic breviter quod diximus alibi, necessitatem ut jus aliquod det in rem alienam, summam esse debere: requiri præterea ut ipso domino par necessitas non subsit: etiam ubi de necessitate constat, non ultra sumendum quam exigit: id est, si custodia sufficiat, non sumendum usum; si usus, non sumendum abusum: si abusu sit opus, restituendum tamen rei pretium."

†B. II, Ch. 2, sec. 10, in which the same precise sentiment is contained as is here repeated.

use of it to the proprietor; and if the use be necessary, we ought not to consume it; and if we cannot help consuming it, we ought to return the full value of it."

Having illustrated this exemption of neutral property from the effect of war between others, with the sole exception of cases of extreme necessity, by a train of examples, he proceeds to lay down the duty of neutrals towards the belligerent parties, as follows:

"On the other side it is the duty of those who are not engaged in the war, to sit still and do nothing that may strengthen him that prosecutes *an ill cause* or to hinder the motions of him that *hath justice* on his side, as we have said before. [Ch. 1, of this B., sec. 5.] But in a *dubious cause* to behave themselves alike to both parties; as in suffering them to pass through their country, in supplying them with provisions, and in not relieving the besieged." In illustration of the impartiality here enjoined, a number of instances are specified in the sequel of the chapter and the notes.

The 5th section of chapter 1, above referred to, makes up the whole of what Grotius teaches on this branch of the subject. As it is more definite and particular than the other extracts, the insertion of it, though of greater length, will be proper.

*"Here also there uses to arise another question, what we

*"Sed et questio incidere solet, quid liceat in eos qui hostes non sunt, aut dici non sunt, sed hostibus res aliquas subministrant. Nam et olim et nuper de ea re acriter certatum scimus, cum alii belli rigorem, allii commerciorum libertatem defenderent. Primum distinguendum inter res ipsas. Sunt enim quæ in bello tantum usum habent, ut arma: sunt quæ in bello nullum habent usum, at quæ voluptati inserviunt; sunt quæ et in bello et extra bellum usum habent, ut pecuniæ, commeatus, naves, et quæ navibus adsunt. In primo genere verum est dictum Amalasuinthæ ad Justininum, in hostium esse partibus qui ad bellum necessaria hosti administrat. Secundum genus querulam non habet."

"In tertio illo genere usus ancipitis, distinguendus erit belli status. Nam si tueri me non possum nsis quæ mittuntur intercipiam, necessitas, ut alibi exposuimus, jus dabit, sed sub onere restitutionis, nisi causa alia accedat. Quod si juris mei executionem rerum subvectio impedierit,

"may lawfully do to those who are not our enemies, nor are "willing to be thought so, and yet supply our enemies with "certain things. There have been formerly, and still are "great disputes about this matter, some contending for the "rigors [*of the laws] of war, and others for a freedom of "commerce.

"But first we must distinguish between the things them- "selves. For there are some things which are of use only "in war, as arms, &c. Some that are of no use in war, as those "that serve only for pleasure; and lastly, there are some things "that are useful both in peace and war, as money, provisions, "ships, and naval stores. Concerning the first (things useful "only in war) it is true what Amalasuintha said to the Emperor "Justinian, he is to be reputed as siding with the enemy, who "supplies him with things necessary for war. As to the second "sort of things [for pleasure only, of which sort he gives "examples from Seneca] there is no just cause of complaint.

"As to the third sort of things, that are useful at all times, "we must distinguish the present state of the war. For if I "cannot *defend myself* without interrupting those things that "are sent to my enemy, *necessity* † (as I said before) will give

idque scire potuerit qui advexit, ut si oppidum obessum tenebam, si portus clausos, et jam deditio aut pax expectabatur, tenebitur ille mihi de damno culpa dato, ut qui debitorem carceri exemit, aut fugam ejus in mean fraudem instruxit: et ad damni dati modum res quoque ejus capi, et dominium earum debiti consequendi causa quæri poterit. Si damnum nondum dederit, sed dari voluerit, jus erit rerum retentione eum cogere ut de futuro caveat obsidibus, pignoribus aut alio modo. Quod si preterea evidentissima sit hostis mei in me injustitia, et ille eum in bello iniquissimo confirmet, jam non tantum civiliter tenebitur de damno, sed et criminaliter, ut is qui judici imminenti reum manifestum eximit: atque eo nomine licebit in eum statuere quod delicto convenit, secundum ea quæ de pœnis diximus; quare intra eum modum etiam spoliari poterit."

* The orignal is "belli rigorem," *rigor of war.*

† The note here of Barbeyrac, himself a respectable authority, is interesting both as it corroborates the liberal spirit of Grotius in favor of neutral commerce, and as it explains the ideas not only of Barbeyrac

"me a good right to them, but upon condition of restitution, "unless I have just cause to the contrary. But if the supply "sent hinder the execution of my designs, and the sender might "have known as much; as if I have besieged a town or blocked "up a port, and thereupon I quickly expect a surrender, or a "peace, that sender is obliged to make me satisfaction for the "damage that I suffer upon his account, as much as he that "shall take a prisoner out of custody that was committed for a "just debt, or helps him to make his escape, in order to cheat "me; and proportionably to my loss I may seize on his goods "and take them as my own, for recovering what he owes me. "If he did not actually do me any damage, but only designed "it, then have, a right by detaining those supplies, to oblige "him to give me security for the future, by pledges, hostages, "or the like. But further, if the wrongs, done to me by the "enemy, be openly unjust, and he, by those supplies, puts him "in a condition to maintain his unjust war, then shall he not

but of Cocceius, another respectable jurist, in relation to blockades. The note is as follows, see p. 539, note 5: "Our author [Grotius] here supposes the case of being reduced to the last extremity; and then his decision is well founded, whatever Mr. Cocceius says, Dissert. de Jur. Bel. in Amicos, sect. 12, wherein he only criticises our author in regard to what he advances elsewhere, *that in case of necessity, the effects become common*. It is true, it suffices, that at such a time the goods of another may be used without even the proprietor's consent. But as to the following cases, that lawyer has reason, in my opinion, to say, § 15, 17, that provided that in furnishing corn, for instance, to an enemy besieged and pressed by another, it is not done with design to deliver him from that unhappy extremity, and the party is ready to sell the same goods also to the other enemy, the *state of neutrality and liberty of commerce* leave the besieger no room for complaint. I add, that there is the more reason for this, if the seller had been accustomed to traffic in the same goods with the besieged before the war." This last remark of Barbeyrac, as meant by him, is just. The primary duty of a neutral is impartiality; and the circumstance of an antecedent and habitual trade to the same place, would be the strongest, though not the only evidence, that the continuance of it, proceeded from the ordinary motives of mercantile gain, and not from an unlawful partiality towards one of the nations at war.

"only be obliged to repair my loss, but also be treated as a "criminal, as one that rescues a notorious convict out of the "hands of justice; and in this case it shall be lawful for me "to deal with him agreeably to his offence, according to those "rules which we have set down for punishments; and for that "purpose I may deprive him even of his goods."

The following extracts explain the principles of Grotius on the cases, where the property of an enemy is found in a neutral ship, or neutral property in a belligerent ship.

In a note to B. III, Ch. 1, sec. 5, Grotius cites the Consolato del Mare for the doctrine that enemy's property might be taken in neutral ships, but that the ship of an enemy did not affect the neutral cargo, nor the cargo of an enemy, the neutral ship. The residue of this long note recites and disapproves the attempts of Great Britain, France and other nations, to prohibit altogether the trade of neutrals with their enemies.

* B. III, Ch. 6, sec. 6: "Wherefore the common saying that goods found in our enemies' ships are reputed theirs, is not so to be understood, as if it were a constant and invariable law of the right of nations; but a maxim, the sense of which amounts only to this, that it is commonly presumed, in such a case, the whole belongs to one and the same master; a presumption, however, which, by evident proofs to the contrary, may be taken off. And so it was formerly adjudged in Holland, in a full assembly of the sovereign court during the war with the Hanse Towns in 1338, and from thence hath passed into a law."

In a note to this section, Grotius adds:† "Neither do the ships of friends become lawful prize on the account of the ene-

* Quare quod dici solet, hostiles censeri res in hostium navibus repertas, non ita accipi debet quasi certa sit juris gentium lex, sed ut præsumptionem quandam indicet, quæ tamen validis in contrarium probationibus possit elidi. Atque ita in Hollandia nostra jam olim, anno scilicet 1338, flagrante cum Ansiaticis bello, frequenti senatu judicatum, et ex judicato in legem transiisse comperi.

† Sed neque amicorum naves in prædam veniunt ob res hostiles, nisi ex consensu id factum sit dominorum navis.

mies' goods; unless it is done by the consent of the owner of the ship;" referring in this case to the authority of several writers, and the practice of several nations.

The spirit of these passages, taken altogether, can leave no doubt, as to the side on which the authority of Grotius is to be placed.

In the first place he expressly limits the general right of war against the property of neutrals, to cases of that evident and *extreme necessity*, which must always make a law for itself whenever it exists, but which can never be applied to the cases falling within the belligerent claim asserted by Great Britain.

In the next place he particularly limits to the case of a necessity of self-defence, the right of intercepting neutral supplies, even to a blockaded or besieged place; and makes it a condition, moreover, that a surrender of the place, or a peace, be quickly expected as the effect of the blockade.

In the third place it is to be observed, that as in these passages, Grotius has taken express notice of the several questions of contraband, of blockades, and of the carriage of enemy's property, which formed all his exceptions to the freedom of neutral commerce; his silence with respect to the British exception is an abundant proof, that this last had either never been then asserted, or that he considered it so manifestly groundless as not to merit notice.

This is, in fact, the material inference to be drawn from the review here taken of this celebrated jurist: and for the sake of this inference principally, the review has been made thus full and minute; for it must be admitted, that in general his ideas are much less precise and satisfactory than those which are to be found in succeeding authorities. In distinguishing wars, by their justice or injustice, on which neutrals have no right to decide; in not distinguishing supplies, as they may be sold only or sent; or as they may be sent by a government, or by private persons; nor sufficiently distinguishing between the right of a belligerent to prevent supplies by intercepting them, and the right to do so, by punishing the offenders; he gives a proof

that his work is more to be admired for the novelty and magnitude of the undertaking, than for the accuracy of its doctrines and definitions.

Pufendorf, who may next be consulted, contents himself with a simple reference to Grotius on the question—"How they are to be dealt with, who supply the enemy with what he wants."

In a note by Barbeyrac on this reference to Grotius, he himself refers to a letter from Pufendorf to Groningius, as conveying the judgment of Pufendorf with respect to the question "whether we may hinder neutral nations from trading during the war with the enemy." Groningius, it seems, having consulted Pufendorf on a treatise he had planned upon "free navigation," received the following answer; which, having undergone much discussion, and as found in the English translation, seeming to glance at the British principle of intercepting a commerce opened to neutrals in time of war, is copied at full length, and receives an attention which would not otherwise be bestowed on it:

"The work, sir, that you have in view, relating to the *liberty of navigation*, excites my curiosity. It is a curious subject, and what no person as yet, that I know of, has particularly handled. I very much however fear, if I may judge from your letter, that you will find people who will dispute your notions. The question is, certainly, one of those which have not yet been settled upon any clear or undeniable principles; so far as to afford a general rule to mankind. In all the examples brought upon this subject, there is a mixture of *right* and *fact*. Each nation usually allows or forbids the maritime commerce of neutral people with its enemy, either according as it is its interest to preserve the friendship of those people, or it finds itself strong enough to obtain from them what it requires. For example, the English and Dutch may say, without absurdity, that it is lawful for them to do all the ill they can to the French, with whom they are at war; and consequently to employ the method the most proper to weaken them, which

is to traverse and ruin their trade. They say it is not reasonable that neutral nations should enrich themselves at their expence; and by engrossing to themselves a commerce which the English and Dutch want, furnish the French with money to continue the war. This seems the rather just, because England and Holland commonly favor the trade of neutral nations, by suffering them to transport and sell in foreign markets merchandizes of their own growth and manufacture. In short, they say that they are willing *to leave them the trade they usually carry on in time of peace; but they cannot see them take advantage of the war, to extend their commerce to the prejudice of England and Holland.* But as this matter of trade and navigation does not so much depend upon rules founded on a general law, as upon conventions made between particular nations; so in order to form a solid judgment of the point in question, we ought previously to examine what treaties subsist between the northern crowns and England and Holland; and whether these last powers have offered the former just and reasonable conditions. On the other hand, nevertheless, if the northern princes can *maintain their trade* with France, *by sending strong convoys* with their fleets, *I* see nothing *to blame* in it, provided their vessels do not carry contraband goods. The laws of humanity and equity between nations do not extend so far as to require, *without any apparent necessity*, that one people should give up its profit in favour of another. But as the avarice of merchants is so great that for the smallest gain they make no scruple of exceeding the just bounds of commerce; so nations that are at war may certainly visit neutral ships, and, if they find prohibited goods on board, have a full right to confiscate them. Besides I am no way surprised that the northern crowns have a greater regard to the general interest of Europe, than to the complaints of some greedy merchants who care not how matters go, provided they can satisfy their thirst of gain. These princes wisely judge that it is not at all convenient for them to take precipitate measures, while other nations unite all their forces

to reduce within bounds an insolent and exorbitant power, which threatens Europe with slavery, and the Protesant religion with destruction. This being the interest of the northern crowns, it is neither just nor necessary, that for a present advantage, they should interrupt so salutary a design, especially as they are at no expence in the affair and run no hazard," &c.

Without knowing more of the plan of "free navigation" espoused by Groningius, it is not easy to understand precisely the sentiments of Pufendorf on the subject. It deserves to be remarked, however, that, in the argument on the belligerent side, he states not what *he thought*, but what *they said*. On the neutral side he expresses his own opinion: "On the other hand, nevertheless, if the northern princes can maintain their trade by sending strong convoys with their fleets, *I see* nothing to blame in it, provided their vessels do not carry *contraband goods*."

But what is most material to be observed is, that the expression, "that they (the belligerent nations) *are willing to leave them* (the neutrals) *the trade they usually carry on in time of peace; but that they cannot see them take advantage of the war to extend their commerce to the prejudice of England and Holland*," cannot possibly refer to the British distinction between a trade usually permitted in peace, and a trade permitted only in war. Such a construction, by no means countenanced either by the general tenor of the letter, or the commercial history of the period, is absolutely precluded by the preceding sentence. "They say, qu'il n'est pas just que les peuples neutres s'enrichissent à leurs depens, et en attirant â eux un commerce *interrompu pour l'Angleterre et la Holland*, fournissent à la France des secours, &c." The *English translation* of this sentence is equivocal, if not false. The true meaning of it is, that it was not deemed just that neutrals should enrich themselves by entering into a commerce interrupted, for England and Holland, by the war. The commerce in question, therefore, was not a commerce opened to neutrals during the

war; but a commerce which England and Holland had carried on with France previous to the war, which the war had shut against them, and which they did not like to see transferred to commercial competitors remaining at peace.*

Pufendorf, then, not derogating in this explanation of his sentiments, from his reference to Grotius for the law of nations concerning neutral rights and duties, but rather strengthening the neutral rights asserted by Grotius, must be placed in the same scale in which Grotius has been placed.

Bynkershoeck is the authority next in order of time. He treats the subject of belligerent and neutral relations with more attention, and explains his ideas with more precision, than any of his predecessors.

His 9th chapter is professedly on the question,† "what neutrals may or may not do, during a war between other nations." After stating, hypothetically, an unlimited claim, on the neutral side, to trade with belligerents, in every thing, as if there was no war; rejecting the distinction made by Grotius between a just and unjust war; and urging the duty of impartiality towards those engaged in it, he proceeds to observe,‡ "that

* It is not amiss to remark, that the sentiments in this letter, so far as they favor the rights of neutral commerce, have the greater weight, as the writer, though a Saxon by birth, was a privy counsellor to the Elector of Brandenburg, and that the letter was written at Berlin, whilst Prussia was of the belligerent party against France.—Ompteda, p. 270.

Sir William Scott, supposing him to have been a Swede, endeavored, in the case of the Swedish convoy, to draw from that circumstance a peculiar emphasis to the concluding part of the letter, which, by grounding a prohibition of all trade with France on the extraordinary nature of the war, seemed to favor one of the grounds of which the Judge was willing to avail himself in his decision of that case. It is a little singular, however, that in consulting this document, he should have overlooked an express recognition by this illustrious authority, not three sentences preceding his quotation, of the neutral right to protect a trade *by force of convoy;* which was the precise question to be decided in the case.

† De his [non hostibus], quæritur quid facere vel non facere possunt, inter duos hostes.

‡ Amicorum nostrorum hostes bifariam considerandos esse, vel ut

"the enemies of our friends are to be viewed in a two-fold char-
"acter; either as our friends, or the enemies of our friends.
"If you consider them as friends, it would be lawful to aid
"them with our counsel, and to succor them with military
"forces, with arms, and with all other things whatsoever useful
"in war. But, inasmuch as they are the enemies of our
"friends, that cannot lawfully be done by us; because we should
"in so doing, prefer one to another in the war, contrary to the
"equality of friendship, which is of primary obligation. It is
"better to preserve friendship with both, than, by favoring
"one in the war, to renounce tacitly the friendship of the other.

"And, indeed, what I have just said is taught not only by
"reason, but also by the usage received among almost all na-
"tions. For although the commerce with the enemy of our

amicos nostros, vel ut amicorum nostrorum hostes. Si ut amicos consideres, recte nobis iis adesse liceret, ope, consilio. eosque juvare, milite auxiliari, armis, et quibus cunque aliis in bello opus habent. Quatenus autem amicorum nostrorum hostes sunt, id nobis facere non licet, quia sic alterum alteri in bello præferremus, quod vetat æqualitas amicitiæcui in primis studendum est. Prestat cum utroque amicitiam conservare, quam alteri in bello favere, et sic alterius amicitiæ tacite renunciare. Et sane id, quod modo dicebam, non tantum ratio docet, sed et usus inter omnes fere gentes receptus. Quamvis enim libera sint cum amicorum nostrorum hostibus commercia, usu tamen placuit, ut *capite proximo* latius ostendam, ne alterutrum his rebus juvemus, quibus bellum contra amicos nostros intruatur et foveatur. Non licet igitur alterutri advehere ea, quibus in bello gerando opus habet, ut sunt tormenta, arma et quorum præcipuus in bello usus, milites; quin et milites variis gentium pactis excepti sunt; excepta quandoque et navium materia, si quam maxime ea indigeat hostis ad extruendas naves, quibus contra amicos nostros uteretur. Excepta sæpe et cibaria, quando ab amicis nostris obsidione premuntur hostes, aut alias fame laborant. Optimo jure interdictum est, ne quid eorum hostibus subministremus, quia his rebus nos ipsi quodammodo vidiremur amicis nostris bellum facere. Igitur si hostes simpliciter consideremus ut amicos, recte cum iis commercia exercemus, et merces quascunque ad eos mittimus; Si consideremus ut amicorum nostrorum hostes, excipiuntur merces, quibus in bello amicis nostris noceatur, et hæc ratio priorem vincit; quomodocunque enim alteri contra alterum succurramus, bello nos interponimus, quod salva amicitia non licet.

"friends be free, it is agreeable to usage, as in the next chapter "I shall shew more at large, that we should assist neither one "nor another, with those things which may furnish and foment "the war against our friends. It is not lawful, therefore, to "carry to either, those things which are needful in making war; "as are cannon, arms, and what are of principal use in war, "soldiers; who are also excepted by various treaties between "nations: materials for ships are also sometimes excepted, "where an enemy is in absolute want of them for building ships "to be employed against our friends. Provisions even, are "often excepted, when an enemy is pressed by the siege of our "friends, or is otherwise labouring under the want of food. "On the best ground, therefore, are we interdicted to supply "any of these things to belligerents; because by these things "we should, in a manner, appear to make war ourselves on our "friends. If, therefore, we consider belligerents, simply, in the "light of friends, we may rightfully carry on commerce with "them, and send them merchandises of whatever kind; if "we consider them as the enemies of our friends, merchandizes "are to be excepted, which, in war, might annoy our friends; "and this consideration prevails over the former one; for in "whatever manner we succour one against the other, we take "part in the war, which would be incompatible with the preser- "vation of friendship."

Thus far the doctrine of this jurist cannot be mistaken. He lays it down as a general rule, that the trade of neutrals with the nations at war, provided it be impartial, is as if there were no war; but that certain articles, as instruments of war, form an exception to this general rule; to which he suggests as a further exception, the case of a siege, or of a similar pressure of famine. It cannot be pretended that there is either a single general expression, or particular allusion, that can be tortured into an exception of any trade, merely for the British reason, that it was not open to neutrals before, as well as during, the war.

The residue of the chapter is chiefly employed in discussing

the legality and construction of treaties of succour and subsidy, between a nation at peace and nations at war; after which he proceeds to the tenth chapter, in which he treats of the list of contraband, with several questions incident to it. His doctrine here, the same precisely as in the preceding chapter, is laid down in the following words:* "The rule, confirmed almost "invariably by treaties is, that neutrals are not to carry con- "traband articles to our enemies. If they carry them and are "intercepted, they incur a forfeiture. But with the exception "of these articles, *they trade freely* both backward and forward; "and carry with impunity, *all other articles* whatever to the "enemy."

That under the term contraband, he could mean to class so vague and novel a description of trade, as that which distinguishes between commercial regulations, as existing before the war, and as made in the course of the war, is rendered the more impossible, by the definition given of contraband:† "Hence by contraband, are to be understood, things which in *their actual state* are *adapted to war;* without considering whether apart from war, they may also be of use; there being few instruments of war, which may not be used for other purposes." For this he gives as a just reason, that‡ "if you prohibit every material out of which anything may be formed for warlike use, great would be the catalogue of prohibited articles; since there is scarcely any material, out of which something at least, adapted to war may not be fabricated."

*Regula est, pactis fere perpetuis probata, ne non hostes, ad hostes nostros, vehant "*contrabande goederen.*" Si vehant, et deprehendantur, in commissum cadant; exceptis autem his, libere utrimque mercantur, et quaecunque alia ad hostes vehunt impune.

† Ex his fere intelligo, contrabanda dici, quæ, uti sunt, bello apta esse possunt, nec quicquam interesse an et extra bellum usum præbeant. Paucissima sunt belli instrumenta, quæ non et extra bellum præbeant usum sui.

‡ Si omne materiam prohibeas, ex qua quid bello aptari possit, ingens esset catalogus rerum prohibitarum, quia nulla fere materia est, ex qua not saltem aliquid, bello aptum, facile fabricemus.

In the ensuing chapter, he treats of the case of sieges and blockades, as an exception to the freedom of neutral character.

In the 11th chapter, he examines the question, "whether the contraband character of a part of the cargo, can affect the residue of the cargo or the ship;" with several other questions incident to such mixed cases.

Chapter 13th relates to neutral property in the ships of an enemy; which he exempts from confiscation. His position son this subject shew how much the turn of his judgment must have been adverse to any such restrictions on neutral commerce, as that instituted by Great Britain.* "According to reason, a right of that sort [to confiscate neutral property in a belligerent vessel] cannot be defended; for why may I not be allowed to use the ship of my friend, though your enemy, in transporting my merchandize? When treaties do not prohibit, I have a right, as I said above, to carry on commerce with your enemy; and if this be lawful, it is also lawful to enter into any contracts whatever with him; to buy, to sell, to let, to hire, &c. Wherefore, if I shall have engaged his ship and his service to transport my effects by sea, it was a transaction on every principle lawful. You, as his enemy, may take his ship; but with what right can you take what belongs to me, that is, to your friend? If, indeed, I prove them to be mine; otherwise I agree with Grotius, that there is some room for presuming things found in the ship of an enemy, to be enemy's property."

Finally, in his 14th chapter, he treats the case of enemy's

* Ex ratione, utique, ejusmodi jus defendi non poterit; nam cur mihi non liceat uti nave amici mei, quanquam tui hostis, ad transvehendas merces meas? Si pacta non intercedant licet mihi, ut supra dicebam, cum hoste tuo commercia frequentare; quod si liceat, licebit quoque cum eo quoscunque contractus celebrare, emere, vendere, locare, conducere, atque ita porro. Quare, si ejus navem operamque conduxerim, ut res meas trans mare vehat, versatus sum in re omni jure licita. Tibi, qua hosti licebit navem ejus occupare, sed quo jure res meas, id est amici tui, occupabis? Si nempe probem res meas esse; alioquin Grotio adsentior, ex prœsumptione quodam pro rebus hostilibus esse habenda quæ in navi hostili inveniuntur.

effects in neutral vessels; deciding with Grotius and others, that the neutrality of the ship does not protect the cargo from capture and condemnation. He consequently makes this case also an exception to the general freedom of neutral commerce, in favor of belligerent privileges.

From this distinct and full view of the sentiments of Bynkershoeck, it is clear, that the whole weight of his authority is opposed to the principle advanced by Great Britain. He is the first writer who seems to have entered into a critical and systematic exposition of the law of nations, on the subject of maritime commerce between neutral and belligerent nations; and the plan which he adopted was well calculated to do justice to the subject. Instead of undertaking, after the example of Grotius and Pufendorf, an entire code of public law, he selected for a more thorough discussion, the particular questions which were deemed most important, and most frequent in the transactions and intercourse of modern nations. Among these, he very properly classed the question of neutral commerce, and bestowed on it, the formal investigation which we have seen. He begins with the general question, how far a war between two nations can affect the rights, particularly the commercial rights, of a nation at peace with both, deciding in favor of neutral nations, that their commerce remains free as a general rule; and in favor of belligerent nations, that in certain cases, exceptions to that general freedom are prescribed by the principle of self-defence. He goes on then to examine the several cases which had been allowed or claimed, as exceptions. He establishes the belligerent right to intercept articles on the list of contraband. He establishes also the right to controul supplies to places besieged or blockaded. He concurs in the doctrine, that the flag of a friend does not protect the property of an enemy. He discusses the claim, maintained by some, to confiscate the property of a friend under the flag of an enemy, which he disproves. He discusses, moreover, several other minor questions, which were incident to the main subject. He appears, in short, to have taken a comprehensive view of the

commercial relations between neutral and belligerent nations; and to have omitted no question, belonging to those relations, which was of sufficient importance to deserve his attention. And yet, it appears, that he has not even glanced at the question, "whether a neutral commerce, in articles not contraband, nor going to a besieged or blockaded place, was unlawful, for the reason that the belligerent party had been induced by the war, to new-model its commercial regulations." Does it not necessarily and undeniably follow, either that no such pretension had, at that period, ever been started, or that it had received no countenance, which could entitle it to notice? It is impossible to conceive that a question of such magnitude could be otherwise passed over, by a pen which dwelt with such minute attention on questions less nearly allied to the main subject.

The authority of Bynkershoeck, in this case, ought to have the greater weight with Great Britain, because, in other cases, so much weight is claimed for it, by the champions of her favorite doctrines.

The reputation which Vattel enjoys in Great Britain, greater perhaps than he enjoys any where else, requires that he should be particularly consulted on this subject. The work of Vattel unquestionably possesses great merit; not so much, indeed, for the originality of his plan, or his matter, which he admits to have been derived from Wolf; as for the agreeable dress which he has given to the dry treatise of his prototype, and for the liberal spirit which has, in many instances, improved the doctrines of all his predecessors. Vattel is, however, justly charged with failing too much in the merit of a careful discrimination; and sometimes with delivering maxims, which he either could not reconcile, or does not take pains to explain. In the chapter on neutrality (B. III, Ch. 7,) he might perhaps have been more exact in his definitions, and more lucid in the order of his ideas. His meaning, nevertheless, is, on the whole, sufficiently clear, and arranges him beyond all controversy, with Grotius, Pufendorf, and Bynkershoeck, in opposition to the doctrine under consideration.

As the basis of the true doctrine, on the subject of neutral commerce, he lays down these principles:

That a neutral nation is bound to an exact impartiality;

That this impartiality relates solely to the war;

That it includes two obligations: the first forbidding succours in troops, not stipulated before the war, arms, ammunition, or any thing of *direct use* in the war; the second, requiring that in whatever does not relate to the war, one of the parties must not be refused, *on account of its present quarrel*, what is granted to the other. He observes "that this does not trespass on the liberty of the neutral nation, in negotiations, connexions of friendship, or its trade, to govern itself by what is most advantageous to the State. When this consideration induces it to *preferences in things* of which every one has the free disposal, it only makes use of its right, and is *not chargeable* with partiality. But to refuse any one of these things, to one of the parties, purely as being at war with the other, and for favoring the latter, would be departing from an exact neutrality."

Having laid this foundation, and recommended to nations, intending, as they have a right, to remain neutral, that they should secure their neutrality by treaties for the purpose, he proceeds to state more particularly—

1st. "That whatever a nation does in use of its own rights, and *solely with a view to its own good*, without partiality, without *a design* of *favoring one power to the prejudice of another*, cannot, in general, be considered as contrary to neutrality; and *becomes such*, only upon *particular occasions*, when it cannot take place without injury to one of the parties, who has then a particular right to oppose it. *Thus*, the besieger has a right to prohibit access to the place besieged. Exclusively *of this kind of cases*, the quarrels of another cannot deprive me of the free disposal of my rights in the pursuit of measures which I judge advantageous to my country." Hence he infers a right to permit, in certain cases, levies of troops to one of the parties, and to deny it to the other, where there may be good reason for the distinction; and where it is the custom, as among the

Swiss, to grant levies; and, consequently, where the custom would of itself be a proof that the grant was not the effect of partiality in relation to the war. He asserts, in like manner, for the sovereign, as well as private citizens, in the habit of lending money at interest, the right to lend it to one of the parties at war, "who may possess their confidence, without lending it to the other;" observing, that "whilst it appears that this nation lends out its money purposely for improving it by interest, it is at liberty to dispose of it according to its own discretion, and I have no reason to complain. But if the loan be manifestly for enabling the enemy to attack me, this would be concurring in the war against me." He applies the same remark to the case of troops furnished to an enemy, by the State itself, at its own expence; and of money lent without interest: adding, at the same time, as a further instance of neutral rights, that if a nation trades in arms, timber, ships, military stores, &c., I cannot take it amiss that it sells such things to my enemy, provided it does not refuse to sell them to me also. It carries on its trade without any design of injuring me, and in continuing it, the same as if I was not engaged in war, that nation gives me no just cause of complaint.

Making, thus, impartiality the test of lawfulness in the conduct of neutrals, and the mere pursuit of their own interest, without a design to injure any of the belligerents, the test of impartiality, he enters more particularly on the discussion of the active trade which neutral nations carry on with those at war.

"It is certain," he says, "that, as they [neutrals] have no part in my quarrel, they are under no obligation to abandon their trade that they may avoid furnishing my enemy with the means of making war. Should they make it a point * not to sell to me any of these articles, whilst they take measures for transporting great quantities of them to my enemy, with *a manifest intention of favouring him*, such *a partiality* would exclude them from the neutrality they enjoyed. But if they

* Si elles affectoient, &c.

simply pursue their commerce* [suivre tout uniment leur commerce] they do not *thereby declare themselves* against my interest; they only exercise a right, which they are under no obligation of sacrificing to me."

The *general* freedom of neutral commerce, being thus asserted, the writer goes on to lay down the exceptions which war makes to it.

"On the other hand, whenever I am at war with a nation, both my safety and welfare prompt me to deprive it as much as possible of every thing which may enable it to resist or hurt me. *Here the law of necessity shews its force.* If this law warrants me on occasion to seize what belongs to another, shall it not likewise warrant me to stop *every thing relative to war*, which neutral nations are carrying to my enemy? Even if I should, by taking such measures, render all these neutral nations my enemies, I had better run the hazard than suffer him who is actually at war to be thus freely supplied to the great increase of his power. It is therefore very proper and very suitable to the law of nations which disapproves of multiplying the causes of war, not to consider those seizures of the goods of neutral nations as acts of hostility. When I have notified to them my declaration of war against such or such a people, if they will afterwards run the risk of supplying them *with things relative to war*, let them not complain if their goods fall into my hands, for I do not declare war against them, because they attempted to carry *such* goods. They suffer indeed by a war in which they have no concern, but it is accidentally. I do not

*The Translation, "continue their customary trade," which might be construed to favor the British principle, is evidently erroneous. That which is substituted conveys the true meaning. It is curious that the two authors, Pufendorf and Vattel, who have alone appeared to speak a language any wise favorable to the doctrine in question, should owe the appearance to English mistranslations. It would be uncandid, nevertheless, to insinuate a design in the case; the more so as the translation of Pufendorf was prior to the origin of the British pretension: but the error of translations may have strengthened the pretensions which it countenances.

oppose their right, I only make use of my own, and if our rights clash, and reciprocally injure each other, it flows from the effect of inevitable necessity," &c.

"But that *limits* may be set to these inconveniences; that the commerce of neutral nations may subsist in all the freedom which the laws of war will admit, there are rules to be observed, and on which *Europe seems to be generally agreed.*"

What are the rules which fix these limits?

"The first is carefully to distinguish common goods which have *no relation to war*, from those *peculiarly subservient to it.* In the trade of the former neutral nations are to enjoy *an entire liberty*, the parties at war cannot with any reason deny it, or hinder the importation of such goods into the enemy's country," &c. He observes that the good she referred to, as having relation to war, are those called contraband, of which he gives a description; proceeding thence to shew how far they are subject to confiscation, and to infer from the right of confiscation the right of search on the high seas.

He next mentions, as a limit to the freedom of neutral commerce, that the effects of an enemy found in a neutral ship are subject to capture; deciding otherwise as to neutral effects on board an enemy's ship, which some nations had been in the practice of capturing.

He specifies, as his last limit or exception to the general freedom of neutral commerce, the belligerent right to prohibit all commerce with a place besieged or blockaded; closing the discussion of this particular subject with an emphatic deduction in these words—"A neutral nation continues with the two parties at war, in the *several relations* which *nature* has placed between nations. It is ready to perform towards them both all the duties of humanity reciprocally due from nation to nation. It is *in every thing* not *directly relating to war* to give them *all the assistance in its power*, and of which they may stand in need. But this assistance is to be given with impartiality, that is, in not refusing to one of the parties any thing on account of his being at war with the other. This does not hinder a neutral

State having particular connections of friendship and good neighborhood with one of the parties at war, from granting him *in whatever does* not relate *to military transactions* the preference due to friends: much more may he without giving offence continue to him, for instance in commerce, such indulgencies as have been stipulated in their treaties, &c."

We see then that the authority of Vattel coincides perfectly with the preceding authorities, more especially that of Bynkershoeck, in establishing the general freedom of neutral commerce, with the exception of things relating to the war, and in limiting this exception to the several cases of supplying the enemy with military contraband, of trading with places besieged or blockaded, and of carrying enemy's property.

Perhaps this author, not remarkable as already intimated for well-defined ideas, has in no particular branch of his work left less room for mistaking or perverting his meaning.

It would be improper not to add Martens to the authorities, who ought to be heard on this question. Martens was a professor of law in a Hanoverian University, with a salary from the King of Great Britain as Elector of Hanover, and has distinguished himself by several publications, which demonstrate his critical judgment of the law of nations, and the extent of his researches in order to verify and elucidate it. His SUMMARY of this law is a work which was received by the public with a due portion of that respect which constituted his predecessors authentic depositaries and expositors of the code, by which the society of nations ought to be governed. We find him accordingly on the same shelf already with Grotius, Pufendorf, Bynkershoeck, and Vattel. In Great Britain indeed, notwithstanding his being a subject of her sovereign, and a professor under his patronage, the doctrine he teaches on the question whether free ships make free cargoes, has drawn on him the censure of the zealous advocates for the side taken by Great Britain on that question. In opposing, however, a favorite doctrine of that nation, under the relation in which he stood to it, he gave a proof of integrity and indepen-

dence, which justly inspire the greater esteem for his character, at the same time that they give the greater weight to his opinions. Even there, however, his censors have done justice to his eminent talents, and been ready to avail themselves of his authority, in cases where it supported British principles and interests.

On the present subject the authority of Martens is clear and full.

He first speaks of neutral commerce according to the universal law of nations, and next of the modern law of nations with respect to neutral commerce, and its freedom, as acknowledged by the powers of Europe.

The first he lays down as follows: "The right that a nation enjoys in time of peace of selling and carrying all sorts of merchandize to every nation *who chooses to trade* with it, it enjoys also in time of war, provided that it remains neuter." He admits at the same time that *necessity* may authorize a power at war to hinder the conveyance of *warlike stores* to its enemies, so far as to sequester them till the end of the war, or to take them at their full value for his own use.* He admits again that the power at war may prohibit all commerce with such places "as he is able to keep so blocked up as to prevent any foreigner from entering." But he maintains that "since a belligerent power cannot exercise hostilities in a neutral place, nor confiscate property belonging to neutral subjects, such power ought not to confiscate the goods of an enemy found in a neutral vessel navigating on a free or neutral sea, nor neutral goods found in the vessel of an enemy: provided, however, in both cases that these goods are not warlike stores."

In explaining what he styles the modern law of nations with respect to neutral commerce, and its liberty as *acknowledged* by the powers of Europe, he states it "as generally acknowledged that a neutral power ought not to transport to either of the belligerent powers merchandizes *unequivocally intended*

* This rule corresponds with the sentiments of Grotius.

for warlike purposes, that treaties have at some times swelled out this list with articles not evidently and unequivocally intended for such purposes; at others have expressly declared these not to be contraband, and that this last ought to be presumed to be the case between powers having no treaties on the subject."

"With respect to merchandizes which are not contraband" he says, "it is generally acknowledged by the powers of Europe, that neutral powers have a right to transport them to the enemy,* *except* it be to places blockaded, with which all commerce is prohibited."

These two exceptions, namely contraband of war, and the case of blockaded or besieged places, are the only ones which he allows against the freedom of neutral commerce. For with respect to enemy's property in neutral ships, he considers the new principle which identifies the cargo with the vessel, and thereby avoids the disputes and embarrassments arising from the old principle, as having been sufficiently established to take the place of the old one in the law of nations.

The authority of Martens, then, unequivocally and undeniably concurs with that of his great predecessors, in deciding that the commerce between neutral and belligerent nations, with a very few exceptions, is *entirely free*, and that these exceptions do not include any such pretension as that of Great Britain, to prohibit a trade otherwise lawful, merely because it

*Martens in a note observes that "some powers have, *but in vain*, attempted to forbid neutral nations to carry on commerce with their enemies, of which he mentions the instance of the Dutch in 1666, and the joint instance of England and Holland in 1689. In both these instances, it is well known, the attempt was to intercept all trade with France, and not the trade only which was or might be opened by France during the war;" a distinction to which he was invited by the occasion either to have noticed, if he had thought it worthy of notice, as among the *vain attempts* of some powers to forbid neutral commerce, or to have inserted it in the text as an exception to the freedom of neutral commerce, if he had so viewed it, along with the other exceptions of contraband and blockaded places.

might have been laid open to neutrals in consequence of the war.

It would have been easy to add to the authorities here selected, other respectable jurists within the same period; as well as a phalanx of authorities of later date, both in the South and the North of Europe; but the testimony of Grotius, of Pufendorf, of Bynkershoeck, of Vattel, and of Martens, is more than sufficient for the occasion. They are the luminaries and oracles, to whom the appeal is generally made by nations, who prefer an appeal to law, rather than to power; an appeal which is made by no nation more readily than by Great Britain, when she has sufficient confidence in the justice of her cause.

Two feeble objections may be thought to claim attention, on this branch of the investigation.

First. In describing the general freedom of neutral commerce with a nation at war, the writers who have been reviewed, being strangers to the distinction now introduced between the legal regulations of the latter in time of war, and those in time of peace, have sometimes used expressions, which, though they do not favor, do not necessarily exclude, such a distinction. Thus Bynkershoeck, speaking of the neutral trade of the Belgians with the French, who were at war with the Spaniards, says that it was of right, as free as before the war.* The freedom of neutral commerce is laid down, in similar phrases, by other jurists, both before and after Bynkershoeck. Many of the more modern writers, not apprized of the misconstruction which might be attempted on their phraseology, have also described the general freedom of neutral commerce in time of war, by a reference to the freedom which it enjoyed in time of peace.

The obvious and decisive answer to these criticisms is, that the freedom of commerce between two nations in time of peace does not refer to the actual footing on which it happened to be

* Liberum quarumcunque rerum commercium, quemadmodum, cum nondum bellum esset.—Lib. I, Ch. 10.

placed by the mutual regulations of the parties, a continuance of which would, on a subject so fluctuating as that of commerce be often inconvenient, sometimes absurd; but to the right which the parties have to regulate their commerce, from time to time, as their mutual interest may suggest, or, to adopt the language of Vattel, to the relations in which *nature* has placed independent nations.

This construction is not only the most obvious and rational in itself, but is enforced by several additional reflections.

It is most consistent, and sometimes alone consistent, with other passages in the same authors. An example may be seen in Bynkershoeck, Lib. I, Ch. 9, where the expressions "ut ante bellum constabat," and "ut cum pax esset inter eos, &c.," are evidently meant to comprehend every right, as well as the existing state of commerce between the neutral *and belligerent* parties, previous to the war.

As there is no evidence that the distinction was known in the dates of the elder writers, it would be absurd to suppose them alluding to a state of things which had never existed; rather than to a state of things which was familiar in practice. And with respect to the more modern writers, to most of whom the distinction appears to have been equally unknown, the absurdity of the supposition is doubled by its inconsistency with the whole tenor and complexion of their doctrines and reasonings in behalf of neutral rights. Many of them are, in fact, champions for the principles of the armed neutrality; one of which is, that neutrals may trade freely with, and between any of, the ports of an enemy not blockaded.

Finally—As all the writers on the general subject of neutral commerce, discuss the several other exceptions to its rights, which have, at any time, been claimed by belligerent nations, it would be absurd to suppose that an exception, more extensive than any of them, should be pretermitted. Their silence alone, therefore, is an unanswerable proof, that the exception now contended for, could not be known, or could not be recognized by those writers.

A second objection may be that the practice of opening colonies to neutral trade, had not been introduced, at the dates of these publications, particularly the more early of them.

The fact on which this objection relies, might be disproved by a mass of historical testimony. Two authorities will be sufficient: the first shewing that Spain, represented as the most rigid in her colonial monopoly, began to relax it as early as 1669, even during peace: the second, that France had adopted the same policy, in time of war, as early as the year 1705.

The first is from Long's History of Jamaica, vol. 1, p. 598.

"In 1669, Spain, for *want of ships and sailors* of her own, be-
"gan openly to hire Dutch shipping to sail *to the Indies*, though
"formerly so careful to exclude all foreigners from thence.
"And so great was the supply of Dutch manufactures to Spain,
"&c., that all the merchandize brought from the Spanish West
"Indies was not sufficient to make returns for them; so that
"the Dutch carried home the balance in money." The date of this Spanish relaxation of the colonial monopoly was prior to the work of Pufendorf, which was published in 1672; and two-thirds of the century prior to that of Bynkershoeck, which was published in 1737; and which entered so systematically into the question of neutral rights of commerce.

The other will be found in a Note of Robinson, in his Appendix to Vol. 4, page 17, of his Admiralty Reports. It is there stated, with his authority for the fact, that about the year 1705, it being then a time of war, friendly nations were admitted into the trade of the French colonies, as a better mode of supplying their wants, and getting away their productions, than that of convoys. It is added, that the first vessels thus introduced having been captured, the French minister returned to the old, as the only efficacious, expedient.

The reporter would conclude, from the capture of the neutral vessels, that a neutral trade with colonies was then held to be illegal. But it would be manifestly wrong to resort to an explanation not warranted by any ideas otherwise known to exist at that period; especially when it is so easy to suppose

that the capture was directed against the *French property* on board the neutral vessels. That the property was French is the more to be presumed, as the Dutch, the only nation whose capital might have neutralized the property, were parties to the war. Had they indeed been neutral, their treaties with Great Britain would have protected the trade in their vessels, on the two-fold ground that it was lawful to trade, without restriction, with and between the ports of an enemy; and that the freedom of the ship protected the cargo. The true inference on the subject is, that the neutral carriers were Danes, or of some other nation who had no such treaties with Great Britain, and whose capitals did not neutralize the cargoes of French produce.

## TREATIES.*

All writers on the law of nations, as well didactic as polemic, avail themselves, whenever they can, of the authority of Treaties.

Treaties may be considered under several relations to the law of nations, according to the several questions to be decided by them.

They may be considered as simply repeating or affirming the general law: they may be considered as making exceptions to the general law, which are to be a particular law between the parties themselves: they may be considered as explanatory of the law of nations, on points where its meaning is otherwise obscure or unsettled; in which case they are, first, a law between the parties themselves, and next, a sanction to the general law, according to the reasonableness of the explanation and the number and character of the parties to it: lastly,

* This is a continuation of the same pamphlet, but the first edition divided it in this way.

Treaties may be considered as constituting a voluntary or positive law of nations.

Whether the stipulations in a treaty are to be considered as an affirmance, or an exception, or an explanation, may sometimes appear on the face of the treaty: sometimes being naked stipulations, their character must be determined by resorting to other evidences of the law of nations. In other words, the question concerning the treaty must be decided by the law, not the question concerning the law by the treaty.*

In the present case, it has been shewn, from the sources generally allowed to be the most authentic, that the law of nations is violated by the principle asserted by Great Britain. It is a just inference, therefore, that every article in treaties contradicting that principle, is an affirmance and direct proof of the general law; and that any stipulation of the principle would, as an exception to the general law, be an indirect proof of it.

But supposing, for a moment, the present case to belong to that class, in which the great oracles of the law of nations are obscure, or at variance among themselves; and in which, more-

* In the report by Sir G. Lee, Doctor Paul, Sir D. Ryder, and Mr Murray, afterwards Lord Mansfield, in the case produced by the Silesia loan, the argument drawn from Treaties, on the question whether free ships make free goods, is not very worthy of the celebrated authors, or of the celebrity of the document. Two treaties, stipulating that free ships do not make free goods, are cited as direct proofs on the negative side of the question; and six, stipulating that free ships do make free goods, as exceptions, proving still more strongly the negative side of the question. It could not have been less fair, to consider the six as declaratory of the law, and the two as exceptions to it. But in either case, the inference presupposes, instead of proving, the point in question. As far as the point was to be considered as not otherwise proved, and as requiring the evidence of treaties to remove the uncertainty, the inference ought to have been reversed. The six witnesses ought to have out-weighed the two, and it was incumbent on the reporters, instead of simply referring to the treaties as a confirmation of their opinion, to have considered them as presenting an ostensible objection, which was to be answered.

over, the practice of nations, not being uniform, is an unsatisfactory guide; and consequently, that the evidence of treaties were necessary in order to ascertain the law; still, it will be found that the result of an appeal to that evidence is conclusive against the British pretension. It may be confidently affirmed, that on no point ever drawn into question, the evidence of Treaties was more uniform, more extensive, or more satisfactory.

Nay more; it may be affirmed that the treaties applicable to this case may fairly be considered in their relation to the law of nations last noticed; that is, as *constituting* a law of themselves. If, in any case, Treaties can be sufficiently general, sufficiently uniform, and of sufficient duration, to attest that general and settled concurrence of nations in a principle or rule of conduct among themselves, which amounts to the establishment of a general law; such an effect cannot reasonably be refused to the number and character of the treaties which are applicable to the present case.

That Treaties may amount to a law of nations, follows from the very definition of that law; which consists of those rules of conduct which reason deduces, as consonant to justice and common good, from the nature of the society existing among independent nations; with such definitions and modifications as may be established by general consent.

One evidence of general consent is general usage, which *implies* general consent.

Can treaties which *express* consent be an inferior evidence, where nothing on the face of the treaties, nor in any collateral authority on the law of nations is found to impair the evidence?

Treaties may indeed in one point of view be considered as a higher authority than usage, when they have a generality and continuance, equal to the generality and continuance which give to usage the authority of law; because all treaties involve a usage commensurate with the sphere in which they are obligatory. Whilst usage, therefore, implies consent;

treaties imply the usage, at the same time that they express the consent of the parties to them.*

But there is another point of view in which the influence of treaties, those at least of peace and of commerce, in modifying and defining the rules of public law applicable to periods of war, ought, in preference to the influence of mere practice, to be promoted by all governments which respect justice and humanity, and by all jurists who aspire to the authority of commentators on that subject.

The law of nations, as derived from mere usage or practice during those periods, is evidence for the most part by *ex parte* ordinances, issued by belligerent governments, in the midst of the passions or policy of war; and by judicial decisions, also *ex parte*, and biassed more or less by the same causes, if not by the interest also, which weighty individuals, or perhaps bodies of individuals have, in widening the field of predatory wealth.

Treaties are formed under very different circumstances. Those of peace imply that the hostile passions and pursuits have spent their force, and that a neutral spirit of liberality and accommodation have taken their place: treaties of commerce again are necessarily founded in principles of reciprocal justice and interest, wholly at variance with the violent spirit of war: whilst in the negociation of treaties of both kinds the respective efforts and interests of the parties form those mutual checks, require those mutual concessions, and involve those mutual appeals to a moral standard of right, which are most likely to make both parties converge to a just and reasonable conclusion. Nor is a sense of character without its effect on such occasions. Nations would not stipulate in the face of the

*Bynkerschoeck derives the law of nations from reason and usage [ex ratione et usu] and founds usage on the evidence of treaties and decrees [pactis et edictis.] He therefore makes treaties a legitimate source of the law of nations, and constantly adduces them to illustrate and verify his doctrines.—Quest. Jur. Pub., Lib. I, Ch. 10.

world things, which each of them would separately do, in pursuit of its selfish objects.

It will accordingly be found, as might be expected, that the violent and cruel maxims of war, those still remaining, as well as those from time to time exploded, have had their origin and their continuance in the *separate* usages of belligerent nations, not in treaties; whilst on the other hand, it will be found that the reformation of those abuses has been the gradual work of treaties; that the spirit of treaties is, with few, if any exceptions, at all times more just, more rational, and more benevolent, than the spirit of the law derived from practice only; and consequently, that all further meliorations of the code of public law, are to be expected from the former, not the latter source; and consequently, again, that all enlightened friends to the happiness of nations ought to favor the influence of treaties on the great code by which their intercourse is to be regulated.

The authority of every treaty is to be considered as opposed to the principle asserted by Great Britain, where it either stipulates a general freedom of neutral commerce with a specification of exceptions to it, and an omission of this British exception; or where it stipulates not only a neutral right generally to a *free trade* with belligerent nations, but particularly a right to trade freely *to and between the ports* of such nations. These stipulations, by the force of the terms, necessarily comprehend the coasting and colonial trades, as well as other branches of commerce.

It would be a waste of time to bestow it on the treaties of a remote period, partaking too little of the civilization and spirit of more modern times, to edify them by its examples. It will be sufficient to commence this review with the treaty of Westphalia in 1648, which forms an important epoch in the commercial and political history of Europe, and to remark as the result of some enquiry into antecedent treaties, that they contain nothing which can give the least countenance to the principle under examination.

It will be sufficient also to limit the review of treaties, where Great Britain is not a party, to those of most importance, either for the tenor of the stipulations, or for the particular parties to them, with marginal references to others of analogous import; remarking again generally, that these others are all, either negatively or positively, authorities against Great Britain.

As a more convenient distribution also, the first review will stop with the epoch of the armed neutrality. The relation, which the treaties subsequent to that event have to the subject, will be noticed by itself.

*Examples to which Great Britain is not a party.*

By a treaty concerning navigation and commerce in 1650, preceded by a particular article on the same subject concluded in 1648, it is stipulated between the United Provinces and Spain "that the subjects and inhabitants of the United Provinces (and those of Spain reciprocally), may sail and trade with *all freedom* and safety *in all* the kingdoms, States, and countries which are or shall be in peace, amity, or neutrality, with the State of the said United Provinces; and that they shall not be disquieted or molested in this liberty by the ships or subjects of the King of Spain, upon *the account of hostilities* which may exist, or may happen afterwards, between the said King of Spain and the aforesaid kingdoms, countries, and States, or any of them that may be in amity or neutrality with the said lords the States as above."*

This liberty, in relation to France, was to extend to all sorts of merchandize which might be carried thither before she was at war with Spain; *even contraband of war*,† not proceeding

* Dumont, Tom. 6, part 1, p. 570.

† This is not a solitary instance of such a stipulation. Another is found in the treaty of 1661, between the United Provinces and Portugal, where it was made a general right of the neutral party to carry contraband to countries at war with the other party. Dum., vol. 6, p. 2, 368. Azuni refers to other instances; a treaty between Edward 4

from the States of Spain herself, and capable of being used against the Spanish dominions.

With respect to other countries at peace with the United Provinces, and at war with Spain, the enumerated articles of contraband were not to be carried to them by the United Provinces, but all articles not contraband were to be freely carried, with the exception only of cities and places invested or blockaded.

The Pyrenean treaty, between France and Spain in 1659, established so close a friendship between the two nations, that they were mutually restrained from giving either of them to those attacking the other, any assistance in men, money, or victuals, or with passage through his dominions. Yet it is stipulated in Arts. X—XVI, which are reciprocal, that the French shall have liberty to trade *to all parts whatsoever*, though they should be in war with his Catholic Majesty, excepting Portugal,* whilst it continued in the condition it then was in; all merchandize may be transported to other countries in war with Spain, as was allowed *before the said war*, excepting † such as proceed from the Spanish dominions, and as may be serviceable against Catholic King or his dominions, and contraband goods. By contraband goods are understood all sorts of arms and warlike stores; but corn and all manner of provision and goods, not being arms and warlike stores, are not reputed contraband, and they may be carried to places in war with Spain, excepting to Portugal and blockaded places. The French vessels, passing from the ports of Spain to any port in enmity with that crown, shall not be in any way

and the Duke of Burgundy in 1468—England and Portugal 1642 and 1654—Spain and the Hanse Towns 1647.—Azuni, vol. 2, p. 145, of the French translation.

* Portugal was at that time engaged in a war with Spain for the establishment of her independence, which was viewed by Spain as a rebellious war, and which France was willing, it seems, so far to regard in the same light as to acquiesce in this exception.

† This exception might have been made by Spain herself as a municipal regulation.

retarded or molested, after producing their passes, specifying their lading.*

It here appears, that the parties were at liberty, when neutral, to trade to all parts of a belligerent country, not blockaded, and in all merchandizes not contraband.

The expression "as was allowed before the said war," in this and in the preceding examples, clearly falls within the observations made on the like expressions, used by the writers on the law of nations. They are merely a mode of describing the indefinite right to trade, as if no war had arisen, and consequently to enter into any new channels of trade which might be opened to them.

In a treaty in 1662, between France and the United Provinces, it is stipulated, Arts. XXVI, XXVII, &c., that the parties reciprocally are to trade and navigate with all freedom and safety to countries respectively at war with one and at peace with the other, without any exceptions made by the treaty, other than a trade in contraband, or to a place blockaded.†

The treaty between France and the United Provinces, Arts, XXVII—XXIX, as incorporated with the treaty of Breda in 1667, between the latter power and England, declares that the subjects of either party may sail and traffic in *all countries* at *any time*, in peace with one and at war with the other, and this transportation and traffic shall extend to *all articles* not contraband, and to *all places* not blockaded.‡

In a treaty in 1672, between France and Sweden, Arts. XXIII—XXIX, are of corresponding import.§

A treaty in 1675, between Sweden and the United Provinces, contains like stipulations in the three first and following articles.‖

* Dum., Tom. 6, part 2, page 266.

† Dumont, Tom. 6, part 2, p. 414.

‡ Chalmers' collect. treaties, vol. 1, p. 154. Dumont, Tom. 7, part 1, p. 49.

§ Dumont, Tom. 7, part 1, p. 169.

‖ Dum., Tom. 7, part 1, p. 317.

A declaration made in 1676, by Spain and the United Provinces, confirming the treaty of 1650, stipulates the right of either party to trade with the enemy of the other, as well directly as between enemy's ports, whether the ports belong to the same or different enemies, contraband goods and places blockaded being excepted.*

In Art. XIII, &c., of another treaty in 1678, between France and the United Provinces, the same points are again stipulated.†

The 13th Art. of another treaty in 1679, between Sweden and the United Provinces, contains a like stipulation.‡

So again the like stipulation is contained in Art. XIII of another treaty in 1679, between France and the United Provinces.§

In a treaty in 1701, between Denmark and the United Provinces, the stipulations import an uninterrupted commerce of the neutral with an enemy of the other party, with the usual exception of contraband.‖

The like stipulation is found in a treaty of 1716, Art. VIII, between France and the Hanse Towns.¶

A treaty, Art. VI, between the Emperor Charles VI, and Philip V, of Spain, May 1, 1725, is of like import.**

The same is the language of a treaty in 1752, between Naples and Holland.††

A treaty, Art. XVI, in 1767, between France and Hamburg, and another between France and the Duke of Mecklenburg in 1779, maintain the same doctrine.‡‡

To these authorities derived from the conventional law of Europe, against the British principle under investigation.§§

* Dum., Tom. 7, part 1, p. 325. † Dum., Tom. 7, part 1, p. 359.
‡ Dum., Tom. 7, part 1, p. 439 § Dum., Tom. 7, part 1, p. 359.
‖ Dum., Tom. 8, part 1, p. 35. ¶ Azuni, vol. 2, p. 130.
** Dum., Tom. 8, part 2, p. 115; Azuni, vol. 2, p. 124.
†† Azuni, vol. 2, p. 131.
‡‡ Martens' treaties, vol. 1, p. 255; vol. 2, p. 38.
§§ The list, however, would not extend to the period between 1738 and 1761; no *general* collection of treaties to which Great Britain is not

might be added, if it were necessary, references to other treaties of the like tenor.

*Treaties to which England first, and then Great Britain, was a party.*

By a treaty with Sweden, in 1654, and another in 1656, confirming and explaining the former, it is stipulated, Art. II—IV, that it shall be lawful for the subjects of either of the confederates to trade with the enemies of the other; and, without impediment, to carry to them, except to places blockaded or besieged, any goods whatsoever not contraband, of which a specification is inserted. Provision is also made for the efficacy of passports in certain cases, and against the abuse of them for covering enemies' property.*

The weight of these examples is not diminished by the name of Cromwell, under whose authority the treaties were concluded in behalf of England. In foreign transactions, as well as at home, his character was distinguished by a vigor not likely to relinquish or impair rights, in which his country, as a warlike and maritime power, was interested.

On the other hand, it adds weight to the examples, that they are treaties of *alliance*, containing mutual engagements of friendship and assistance; and, consequently, the less apt to indulge the parties in an intercourse with the enemies of each other, beyond the degree required by the law of nations. This observation is applicable to all the succeeding examples, where the treaties are of the same kind.

On the restoration of Charles II, a treaty of *alliance* was concluded with Sweden in 1661, the 11th Article of which, in pursuance of those above copied from the treaties of 1654 and 1656, stipulates anew, that neither party shall be impeded in carrying to the enemies of the other, any merchandize what-

a party, during that period, being at hand. The chasm is of the less moment, as the British treaties of that period embrace most of the other maritime nations of Europe.

* Chalmers, vol. 1, p. 32–3.

ever, with the exceptions only of articles of contraband, and of ports or places besieged.*

In a treaty with Spain, May 13, 1667, the Articles XXI—XXVI import, that the subjects of each shall trade freely in all kingdoms, estates, and countries at war with the other, in all merchandizes not contraband; with no other exception of places but those besieged or blockaded.†

In July, 1667, a treaty was concluded with the United Provinces, of which Art. III provisionally adopts certain articles from the treaty of Breda, between the United Provinces and France, on the subject of maritime commerce; until a fuller treaty could be perfected between the parties. The articles adopted, in relation to the trade between the subjects of one of the parties and the enemies of the other, declare that the trade shall extend, without impediment, to all articles not contraband, and to all places not besieged or blockaded.‡

In February, 1667–8, the same parties, then under a perpetual defensive alliance by virtue of a treaty of 21st July, 1667, and in a league moreover with Sweden by the triple league of 1668, resumed the subject of maritime and commercial affairs, and repeated, in the first article of their treaty, the precise stipulations adopted provisionally from the treaty between France and the United Provinces.§

A treaty with Denmark, in 1669, stipulates, that they may trade each with the enemies of the other, in all articles not contraband, and to all places not blockaded, without any other exceptions.||

On the 11th July, 1670, another treaty of *alliance* was concluded with Denmark, the 16th Art. of which declares that "neither of the parties shall be impeded in furnishing to the enemies of the other any merchandizes whatever; excepting only articles of contraband, as described in the treaty, and ports and places besieged by the other."¶

* Chalm., vol. 1, p. 52. † Chalm., 17–19. ‡ Chalm., vol. 1, p. 154.
§ Chalm., vol. 1, p. 163. || Dum., Tom. 7, part 1, p. 126.
¶ Chalm., vol. 1, p. 85.

It is worthy of notice in this treaty, and the remark is applicable to others, that the 5th Art. having stipulated a right mutually to trade in the kingdoms, provinces, marts, towns, ports, and rivers of each other, it was immediately provided in the next article, that *prohibited ports and colonies* should be excepted. If it had been conceived that such ports or colonies of enemies were not to be traded with, under the general right to trade with enemies acknowledged in the 16th Article, it is manifest that they would have been as carefully excepted in this, as in the other case, out of the meaning of general terms equally comprehending them. This treaty proves also, that as early as 1670, colonies began to fall under attention in making treaties.

In a maritime treaty of December 1, 1674, with the United Provinces, stating in the title that it was "to be observed throughout *all and every the countries and ports of the world* by sea and land," it is stipulated again, in Art. I, to be "lawful for all and every the subjects of the most serene and mighty prince, the King of Great Britain, with *all freedom* and safety to sail, trade, and exercise any manner of traffic *in all those kingdoms, countries, and estates*, which are, or any time hereafter shall be in peace, amity, or neutrality with his said majesty; so that they shall not be any ways hindered or molested in their navigation or trade, by the military forces, nor by the ships of war or any kind of vessels whatsoever, belonging either to the High and Mighty States General of the United Netherlands, or to their subjects, upon occasion or pretence of any hostility or difference which now is, or shall hereafter happen between the said Lords the States General, and any princes, or people whatsoever, in peace, amity, or neutrality with his said majesty;" and so reciprocally.

Art. II. "Nor shall this freedom of navigation and commerce be infringed by occasion or cause of any war, in any kind of merchandizes, but shall extend to all commodities which may be carried in time of peace, those only excepted

which follow in the next article, and are comprehended under the name of contraband."

Art. III enumerates the articles of contraband.

Art. IV contains a negative list, which, with *all* other articles not expressly included in the list of contraband, may be *freely* transported and carried to *places under the obedience of enemies*,* except only towns or places besieged, environed, or invested.†

This recital has been made the more minute, because it is necessary, in order to understand the whole force of the explanatory declaration between the parties bearing the same date; a document so peculiarly important in the present discussion, that its contents will be recited with equal exactness,

This document, after stating "that some difficulty had arisen concerning the interpretation of certain articles, as well in the treaty marine concluded this first day of December, 1674, as in that which was concluded the 17th February, 1667—8, between his majesty of Great Britain on the one part, and the States General, &c., on the other part," proceeds to state "that Sir William Temple, &c., on one part with eight commissioners on the other, have declared, and do by these presents declare, that the true meaning and intention of the said articles is, and ought to be, that ships and vessels belonging to the subjects of either of the parties, can and might, from

* That this treaty stipulated the rights of neutrals in the extent which it is cited to prove, is acknowledged by the British government, in the letter of Secretary Fox, of May 4, 1782, to M. Simolin the Russian Minister at London, in which this treaty is referred to as the basis of a reconciliation with Holland, and as "a treaty by which the principles of the armed neutrality are established *in their widest extent.*" The first article in the armed neutrality asserts the neutral right in question, and on that ground has been always combated by British writers, and in Parliamentary discussions. In the debate in the House of Commons on the treaty of 1786, with France, Mr. Fox took an occasion to remark that what was then done had "the *unanimous consent* of his Majesty's Council."

† Chalm., vol. 1, p. 177–179.

the time that the said articles were concluded, not only pass, traffic and trade, from a neutral port or place, to a place in enmity with the other party, or from a place in enmity to a neutral place, but also from a port or place in enmity to a port or place in enmity with the other party, whether the said places belong to one and the same prince or State, or to several princes or States, with whom the other party is in war. And we declare that this is the true and genuine sense and meaning of the said articles; pursuant whereunto we understand that the said articles are to be observed and executed on all occasions, on the part of his said majesty, and the said States General, and their respective subjects; yet so that this declaration shall not be alleged by either party for matters which happened before the conclusion of the late peace in the month of February, 1673–4.*

Prior to the peace, neither of them could claim the rights of neutrality against the other.

This declaratory stipulation has been said to be peculiarly important. It is so for several reasons:

1st. Because it determines the right of the neutral party, so far as may depend on the belligerent party, to trade not only between its own ports and those of the enemies of the belligerent party, without any exception of colonies, but between any other neutral port and enemies' ports, without exception of colonial ports of the enemy; and moreover, not only between the ports colonial as well as others, of one enemy and another enemy, but between the different ports of the same enemy; and consequently between one port and another of the principal country; between these and the ports of its colonies; between the ports of one colony and another; and even to carry on the coasting trade of any particular colony.

2d. Because it fixes the meaning not only of the articles in the two specified treaties; but has the same effect on all other stipulations by Great Britain, expressed in the same or equiva-

* Chalm., vol. 1, p. 189.

lent terms; one or other of which are used in most, if not all her treaties on this subject.

3d. Because it made a part of the treaties explained, that free ships should make free goods; and consequently, the coasting and colonial trade, when combined with that neutral advantage, was the less likely to be acknowledged, if not considered as clearly belonging to the neutral party.

4th. Because the explanatory article was the result of the* *solicitation* of England *herself*, and she actually claimed and enjoyed the benefit of the article, she being at the time in peace, and the Dutch in war with France.†

In the treaty with France, February 24, 1677, Articles I, II, and III, import that each party may trade freely with the enemies of the other, with the same merchandize as in time of peace, contraband goods only excepted, and that all merchandizes not contraband "are free to be carried from any port in neutrality, to the port of an enemy, and from one port of an enemy to another; towns besieged, blocked up or invested, only excepted."‡

In 1689, England entered into the convention with Holland, prohibiting *all* neutral commerce with France, then the enemy of both.§ In consequence of the counter treaty of Sweden and Denmark, for defending their neutral rights against this violent measure, satisfaction was made, according to Vattel, for the ships taken from them; without the slightest evidence, as far as can be traced, that any attempt was made by either of the belligerent parties, to introduce the distinction between such part of the trade interrupted, as might not have been allowed before the war, and as was therefore unlawful, and

* See Sir William Temple's correspondence with his government, vol. 4, p. 55, of his works, where the success of his efforts, made with the sanction of his government, is particularly rehearsed.

† See memorial of Dutch merchants in the Annual Register for 1778. These treaties remained in force for more than a century, viz: from 1674, to the war with the United Provinces in 1781.

‡ Jenkinson, vol. 1, p. 209. § Id., vol. 1, p. 209.

such part as having been allowed before the war, might not lawfully be subject to capture.

We are now arrived at the treaties of Utrecht, an epoch so important in the history of Europe, and so essentially influencing the conventional law of nations, on the subject of neutral commerce.

The treaty of navigation and commerce, March 31, 1713, between Great Britain and France, Article XVII, imports, that all the subjects of each party shall sail with their ships with all manner of liberty and security, no distinction being made who are the proprietors of the merchandizes laden thereon, from *any port*, to the places of those who now are, or shall hereafter be, at enmity with the queen of Great Britain and the Christian king, and "to trade with the same liberty and security from the places, ports and havens of those who are enemies of both or of either party, without any opposition or disturbance whatsoever, not only directly from the places of the enemy aforementioned to neutral places, but also *from one place* belonging to an enemy, *to another place* belonging to an enemy, whether they be under the jurisdiction of the same prince or under several."

Art. XVIII. "This liberty of navigation and commerce, shall extend to all kind of merchandizes, excepting those only which follow in the next article, and which are specified by the name of contraband."

Art. XIX gives a list of contraband, which is limited to warlike instruments.

Art. XX specifies others, many of which are in other treaties on the list of contraband, declaring that these with all other goods, not in the list of contraband in the preceding article, "may be carried and transported in the freest manner by the subjects of both confederates, even to places belonging to an enemy, such towns or places being only excepted as are at that time, beseiged, blocked up round about, or invested."*

* Chalm., vol. 1, p. 390.

Could the principle maintained against Great Britain be more clearly laid down, or more strongly fortified by her sanction?

To give to this example the complete effect which it ought to have, several remarks are proper.

In the first place, on comparing the description given of the free trade, which might be carried on between the neutral party and an enemy of the other party, with the description of the free trade allowed between the parties themselves, by the 1st article of the treaty, it appears that in order to except the colonial trade in the latter case, the freedom stipulated in Article I, is expressly limited to *Europe*. The terms are, "that there shall be a reciprocal and entirely perfect liberty of navigation and commerce between the subjects on each part, through all and every the kingdoms, States, dominions of their royal majesties *in Europe*." In the stipulation relating to the neutral commerce of either with the enemy of the other (who, if a maritime enemy, could not fail to possess colonies out of Europe), the terms are, "that all merchandizes, not contraband, may be carried in the freest manner to places belonging to an enemy, such towns or places only being excepted, as are at that time besieged, or blockaded, &c.," without any limitation to Europe, or exception of colonies any where. It is obvious, that the terms here used comprehend all colonies, as much as the terms in the first article would have done, if colonies had not been excepted by limiting the freedom of trade to places "*in Europe;*" and consequently that if any distinction between the colonial and other places of an enemy, had been contemplated in the neutral trade of either party with him, as it was contemplated between the colonies and European possessions of the parties in their commerce to be carried on between themselves, the distinction would have been expressed in the latter case, as it was in the former; and not being so expressed, the trade in the latter case was to be as free to the colonies as it would have been in the former, if the colonies

had not been excepted by the limitation of the trade to Europe.*

Secondly. But the treaty not content with this necessary construction, in favor of a neutral commerce with the colonies of an enemy, proceeds, in conformity to the example in the declaratory convention between England and Holland in 1674, explicitly to declare the freedom of the neutral party, to trade not only from *any port*, to the places of an enemy, and from the places of an enemy to neutral places, but also from *one place* to *another place* belonging to an enemy, whether the places be under the same or different sovereigns. Here both the coasting trade and the colonial trade, which, in relation to the parent country, is in the nature of a coasting trade, are both placed on the same footing with every other branch of commerce between neutral and belligerent parties, although it must have been well known, that both those branches are generally shut to foreigners in time of peace, and if opened at all, would be opened in time of war, and for the most part, on account of the war.

Thirdly. It is well known, that this particular treaty underwent great opposition and discussion, both without and within the British Parliament; and that it was for some time, under a legislative negative. Yet it does not appear, either from the public debates, or from the discussions of the press, as far as there has been an opportunity of consulting them, that the difficulty arose in the least from this part of the treaty. The contest seems to have turned wholly on other parts, and principally on the regulations of the immediate commerce between the two nations. This part of the treaty may be considered, therefore, as having received the complete sanction of Great Britain. Had it indeed been otherwise, the repeated sanctions given to it on subsequent occasions, would preclude her from making the least use of any repugnance shewn to it on this.

* There are other treaties to which this reasoning is applicable.

On the 28th November, 1713, a treaty of peace and another of commerce and navigation, were concluded at Utrecht with Spain, renewing and inserting the treaty of May 13th, 1667, the 21st and 26th Articles of which have been seen to coincide with the rules of neutral commerce, established by the treaty at Utrecht, between Great Britain and France.*

Genoa and Venice were comprehended in the treaty of Utrecht, between Great Britain and Spain.†

The above treaty of 1713, was confirmed by Article XII, of a treaty of December 3, 1715, between Great Britain and Spain.‡

From the above date to the treaty of 1748, at Aix la Chapelle, the following treaties between England and other powers took place; in each of which, the principles established by her treaties at Utrecht, are reiterated.

With Sweden, January 21, 1720, Article XVIII.§

With Spain, June 13, 1721, Article II.—Confirming the treaty of 1667 and 1713.‖

With France and Spain, November, 9, 1729, Article, I.—Renewing all treaties of peace, of friendship, and of commerce, and consequently those of Utrecht.¶

With the Emperor of Germany and the United Netherlands, March 16, 1731, Article I.—Renewing all former treaties of peace, friendship, and alliance.**

With Russia, December 2, 1734.—Stipulating in Article II, a free trade between either party and the enemy of the other, in all articles except munitions of war; and consequently articles permitted after, though not permitted before, the war.††

With Spain, (a convention,) January 14, 1739, Article I.—Reiterating among former treaties, those of 1667 and 1713, above cited.‡‡

* Chalm., vol. 2, p. 109. † Id., vol. 2, p. 341. ‡ Id., vol. 2, p. 174.
§ Jenkinson, vol. 2, p. 263. ‖ Jenkinson, vol. 2, p. 265.
¶ Chalm., vol. 2, p. 200. ** Chalm., vol. 1, p. 312.
†† Azuni, vol. 2, p. 129. ‡‡ Jenkinson, vol. 2, p. 340.

The treaty of Aix la Chapelle concluded in 1748, forms another memorable epoch in the political system of Europe. The immediate parties to it were Great Britain, France, and the United Provinces.

The 3d* Art. of this treaty renews and confirms, among others, *the treaties of Utrecht.*†

This treaty was acceded to by Spain, Austria, Sardinia, Genoa, and Modena.

In 1763,‡ in the treaty between Great Britain, France, and Spain, to which Portugal acceded, the 1st Art. expressly renews and confirms, among other treaties, the treaties of peace and *commerce* at Utrecht.§

The treaty with Russia in 1766, Art. X, stipulates a free trade between either party, being neutral, and an enemy of the other, with the sole exception of military stores, and places actually blockaded.‖

In a convention with Denmark, July 4, 1780, explanatory of a list of contraband settled in a former treaty, it is expressly determined that merchandize not contraband, may be transported to *places* in possession of enemies, without any other exception than those beseiged or blockaded.¶

The treaty of peace in 1783 with France, by Art. II, renews and confirms, among others, the treaties of Westphalia in 1648, of Utrecht in 1713, of Aix la Chapelle in 1748, and of Paris, 1763; in all of which the neutral right, now denied by Great Britain, was formally sanctioned by her stipulations.**

* The treaty *of commerce* at Utrecht not being specially mentioned in that of Aix la Chapelle, it may, perhaps, be questioned, whether it be included in the confirmation. The question is of little consequence, as that treaty is expressly included in the confirmation of preceding treaties, by the treaties of Paris, 1763 and 1783.

† Jenkinson, vol. 2, p. 374.

‡ If Great Britian had rested her captures of vessels trading with colonies of enemies, during the war of 1756, on the principle now asserted, this treaty relinquished the principle.

§ Jenk., vol. 2, p. 180.

‖ Jenk., vol. 3, p. 228.

¶ Chalm., vol. 1, p. 97.

** Jenk., vol. 3, p. 337.

In her treaty of the same date, with Spain, the same confirmation is repeated.*

In the treaty of commerce again with France in 1786, deliberately undertaken in pursuance of Art. XVIII, of the treaty of 1783, the articles above recited from the treaty of Utrecht are inserted word for word; and thus received anew the most deliberate and formal sanction.—*Chalm., vol.* 1, *p.* 350.

It may be here again remarked, that although this treaty underwent the most violent opposition in Great Britain, it does not appear that the opposition was at all directed against the articles on the subject of neutral commerce.

The treaty of 1786 was explained and altered in several particulars, by a convention bearing date August 31, 1787; without any appearance of dissatisfaction, on either side, with the articles on neutral commerce.

In the negotiations at Lisle, in 1797, it was proposed on the part of Great Britain, by her ambassador, Lord Malmesbury, to insert, as heretofore usual in the articles of peace, a confirmation of the treaties of Utrecht, Aix la Chapelle, &c., which was opposed by the French negotiators, for reasons foreign to the articles of those treaties in question.

On this occasion, Lord Malmesbury, in urging the proposed insertion, observed, "that those treaties had become the law of nations, and that if they were omitted† it might produce confusion." This fact is attested by the negotiations, as published by the British Government.‡

If the treaties had become, or were founded in, the law of nations, such an omission, although it might be made a pretext for cavil between the parties, could certainly have no effect on the law of nations; and if the treaties expressed the

* Jenk., vol. 3, p. 377.

† Those treaties were not inserted in the treaty of Amiens, probably for the reasons which prevailed at Lisle.

‡ See Lord Malmesbury's dispatch to Lord Grenville, dated 16th July, 1797.

law of nations on any subject at all, on what subject, it might be asked, have they been more explicit than on that of the maritime rights of neutrals?

This series of treaties, to which Great Britain is an immediate party, lengthy and strong as it is, has not exhausted the examples by which she stands self-condemned. One, in particular, remains for consideration; which, if it stood alone, ought forever to silence her pretensions. It is the treaty with Russia on the 5–17 of June, 1801.

A very important part of the treaty is the preamble:

"The mutual desire of his majesty the King of the United "Kingdoms, &c., and his majesty the Emperor of all the "Russias, being not only to come to an understanding be- "tween themselves with respect to the differences which "have lately interrupted the good understanding and friendly "relations which subsist between the two States; but also "to prevent, by frank and precise *explanations* upon the "navigation of their respective subjects, the renewal of "similar altercations and troubles which might be the con- "sequence of them; and the *common object* of the solicitude "of their said majesties being to *settle*, as soon as can be done, "an equitable arrangement of those differences, and an *in-* "*variable determination of their principles* upon the *rights of* "*neutrality*, in their application to their respective monarchies, "in order to unite more closely the ties of friendship and "good intercourse, &c., have named for their plenipotentiaries, "&c., who have agreed," &c.

With this declaratory preamble in view, attend to the following sections in Article III:

"His Britannic majesty and his Imperial majesty of all the "Russias having resolved to place under a sufficient safeguard "the freedom of commerce and navigation of their subjects, in "case one of them shall be at war while the other shall be "neuter, have agreed;

"1st. That the ships of the *neutral* power may *navigate freely to the ports and upon the coasts* of the nations *at war.*

"2d. That the effects embarked *on board neutral ships* shall be *free*, with the exception of *contraband of war* and of *enemy's property;* and it is agreed not to comprize under the *denomination of the latter*, the merchandize of the produce, growth, or manufactures of *the countries at war* which should have been *acquired* by the subjects of the neutral power, and should be *transported on their account;* which merchandize cannot be excepted *in any case* from the freedom granted to the flag of the said power," &c., &c.

These extracts will receive additional weight from the following considerations:

*First.* This treaty, made with Russia, the power that took the lead in asserting the principles of the armed neutrality, was, with exceptions not affecting the point in question, acceded to by Sweden and Denmark, the two other European powers most deeply interested in, and attached to, those principles. It is a treaty, therefore, of Great Britain, as to this particular point, as well as to most of the others, with Russia, Sweden, and Denmark.

*Secondly.* The treaty had for its great object, as appears by its adoption of so many of the definitions of the armed neutrality, to fix the law of nations on the several points therein, which had been so much contested; the three northern powers yielding the point of free ships, free goods; and Great Britain yielding to all of them, those relating to the coasting, as well as every other branch of neutral trade; to blockades, and to the mode of search; and yielding to Russia, moreover, the point relating to the limitation of contraband. With respect to the case of convoys, a case not comprehended in the armed neutrality of 1780, but of much subsequent litigation, and inserted in that of 1800; a modification, satisfactory to the northern Powers, was yielded by Great Britain; with a joint agreement that the subjects on both sides should be prohibited from carrying contraband or prohibited goods, according to an article in the armed neutrality of both dates.

*Thirdly.* The treaty is expressly declared to be an *invariable* determination [fixation], of their *principles* upon the *rights of*

*neutrality*, in their application to their respective monarchies.

It cannot be pretended that this *stipulated* application of the rights of neutrality to the contracting parties, limits the *declaratory* effect, which is equally applicable to all neutral nations. *Principles* and *rights* must be the same in all cases, and in relation to all nations; and it would not be less absurd than it would be dishonorable, to profess one set of principles or rights in the law of nations towards one nation, and another set towards another nation.

If there be any parts of the treaty, to which this declaratory character is regarded as not applicable, it cannot be pretended that they are the parts relating to the rights of neutrals to trade *freely* to the *ports* and on *the coasts* of nations at war; because, as already observed, the main object of the treaty was to settle the questions involved in the armed neutrality; of which this was a primary one, and is here placed by the structure of the article under the same precise stipulation, with the liability to confiscation, of enemy's property in neutral ships; a point above all others which Great Britain must have wished to consecrate as the law of nations, by declaratory acts for that purpose.

It cannot be pretended that the neutral rights here declared, do not extend to the colonial as well as coasting trade of belligerent nations, because the colonial trade is not only included in a "free trade to the ports and on the coasts" of such nations, but because it is expressly declared that the effects belonging to neutrals, and transported on their account from countries at war, cannot be excepted from the freedom of the neutral flag *in any case*, and consequently not *in the case of colonies*, more than any other portion of such countries. It is not improper to remark that this declaratory stipulation is not only included in the same article, which recognised the principle that enemy's property is excepted from the freedom of the neutral flag, but is associated with that recognition in the same section of the article, and even in the same sentence.*

* The British government having become aware of the entire renunciation here made of her claim to intercept, in time of war, the

If it were possible to controvert the construction here given to the treaty, a reference might be made to a very able speech delivered by Lord Grenville in the British House of Lords in November 1801, in which this very construction is fully demonstrated. The demonstration is rendered the more striking by the embarrassed and feeble opposition made to it by the inge-

commerce of neutrals with the colonies of her enemies, set on foot negociations, with a view to new-model the stipulation. Nothing more, however, could be obtained from Russia than her concurrence in an explanatory declaration, dated October 20, of the same year, in the terms following: "In order to prevent any doubt or misunderstanding with regard to the contents of the second section of the third article of the convention, concluded 5–17 June, 1801, between his *Britannic* Majesty and his Majesty the Emperor of all the *Russias*, the said high contracting parties have agreed and declare, that the freedom of commerce and navigation granted by the said article to the subjects of *a* neutral power, [in the column in French, de la puissance neutre,] does not authorize them to carry in time of war, the produce and merchandize of the colonies of the belligerent power direct to the continental possessions; nor *vice versa* from the mother country to the enemy's colonies; but that the said subjects are, however, to enjoy the same advantages and facilities in this commerce, as are enjoyed by the most favored nations, and especially by the *United States of America*."

In this declaration it will be observed, that it excepts from the general right of the neutral party to trade with the colonies of an enemy, merely the *direct* trade between the colony and the mother country. It leaves consequently, and *recognises* to the neutral party, 1, an *indirect* trade between the mother country and her colonies—2d, the trade between one belligerent country and the colonies of another—3d, the trade between the neutral party itself, and enemy colonies—4th, the trade between such colonies and any other neutral country.

Another observation is, that as the distinction made between the particular trade excepted and the other branches of colonial trade, is not deducible by any possible construction, from the terms of the original text, it must be understood to be a compromise of expediency, on the part of Russia, rather than a derogation from the principle on which the general right is founded.

It is to be further observed, that even the particular exception is abridged by an agreement on the part of Great Britain, that in case a *direct* trade between an enemy country and its colonies should be en-

nuity of the very able speakers who entered the list against him.*

Such is the accumulated and irresistible testimony borne by Great Britain, in her own treaties, against the doctrine asserted by her.

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joyed by any other neutral country, equal advantages and facilities shall be extended to Russia.

It may be still further oberved, that the reference to advantages and facilities, as they may be enjoyed by neutral nations, particularly the *United States*, seems to imply that the United States at least, (who are indeed alluded to by Sir William Scott, as a nation particularly favored by France—2 Rob. Rep., 168; 4 Rob. Rep. Append., p. 4,) furnished an example of such a state of things; and as no such state of things was applicable to them, but that arising from regulations of France, which, being prior to the war of 1793, authorised on the British principle itself, a like trade by the United States during the war, it follows that all captures and condemnations of American vessels trading between France and her colonies under those regulations, were on the British principle itself illegal, and ought to be indemnified.

Lastly, it may be observed, that the treaty to which this explanatory declaration relates, was accepted and ratified by Sweden and Denmark, and that these two powers are not parties to the declaration. If they afterwards became parties, it is more than is known. The observations, of which the declaration has been found susceptible, must, indeed, render the fact of little consequence in any point of view.

* For the speech see a pamphlet entitled, "Substance of the speech delivered by Lord Grenville in the House of Lords, November 13, 1801." The object of his Lordship was to make it appear that the treaty had abandoned certain maritime doctrines of Great Britain; among others the doctrine relating to the trade of neutrals with the colonies, and on the coasts of nations at war. This he has done with the most complete success. With respect to the legality of the doctrine, he assumes, rather than attempts to prove it. Had he employed in the latter investigation the same abilities and candor, which distinguish his discussion of the meaning of the treaty, he could not have failed to be as much convinced of the illegality of the doctrine abandoned, as he was of the abandonment itself. For the very lame replies made by other speakers, see Annual Register for 1802, chap. 4.

An anonymous author of six ingenious letters in vindication of the treaty attempts a distinction between its meaning and that of the

It will be in order now to resume the notice of treaties to which she was not a party, but which authorize some inferences and observations contributing still further, if possible, to invalidate her novel pretensions.

The review heretofore taken of this class of treaties was lim-

armed neutralities, with a view to reconcile the former with the British doctrine.

In the two treaties of armed neutrality in 1780 and 1800, the neutral right to trade with a party at war, is expressed as follows: "to navigate freely from port to port, and on the coasts of nations at war."

In this treaty with Russia, the right is expressed with the following difference of terms: "to navigate freely to the ports, and upon the coasts of the nations at war."

The author of the letters contends that the trade "from port to port" means a neutral trade in the purchased produce of the belligerent country carried coastwise; whereas to trade on the coasts of the belligerent, means nothing more than to proceed from one port to another, in making successive deliveries of the neutral cargo transported to the belligerent country.

The answer is simple as it is conclusive. To navigate on the coast is to navigate from port to port. This is its plain meaning. The distinction between neutral property carried to the belligerent country, and property acquired by a neutral in the belligerent country, is suggested neither by the distinct modes of expression, nor by any circumstance whatever affecting the interpretation of them. The distinction is purely arbitrary. It would not be more so if the different meanings which it assigns to these different phrases, were transposed. To navigate or trade from port to port, must mean to trade on the coasts; and to trade on the coast, is a coasting trade. It may be added, that the distinction and inference attempted, are contradicted both by the general scope of the treaty, and by the terms of Art. 3, § 2.

Were the criticism allowed all the force which the author claims for it, he would still give up more than he would gain. For the Russian treaty affirms the right to navigate freely *to the ports* of those at war, without excepting the colonies. The trade would therefore remain free between all neutral and colonial ports, and the neutral trade between a belligerent and its colonies, would be unlawful on no other ground but that it was merely a coasting trade, without any of those peculiarities often ascribed to the colonial trade by the advocates for the British principle.

ited to such as preceded the armed neutrality. Those now to be added, are principally the treaties and conventions entered into in the years 1780 and 1800.

The treaties of 1780 declare the right of neutrals in the case under discussion, in the following terms: "that all vessels shall be permitted to navigate from port to port, and on the coasts of the belligerent powers." Those of 1800 are in terms too little varied to require recital.

It has never been questioned, that these definitions of the neutral right were as applicable to colonies as to any other of the territories belonging to a belligerent nation. All the British writers have so understood the text, and in that sense, have employed their pens against it.

It need scarcely be remarked that the treaties in question were framed with a view, not of making a new law of nations, but of declaring and asserting the law as it actually stood. The preamble to the convention of 1800, for the re-establishment of an armed neutrality between Russia and Sweden, explains the object in the terms following: "In order that the freedom of navigation and the security of merchandize of the neutral powers may be established, and *the principles* of the law of nations be fully *ascertained*, &c."

The preamble to the convention of 1780, states the principles avowed by the parties to be the principles derived from the primitive rights of nations."

The treaty of 1780 was originally concluded between Russia and Denmark. But it was acceded to by Sweden, Prussia, the United Provinces, Austria, Portugal and Naples; and in effect, by France and Spain. The principles of the treaty had the

From the aspect of the letters, it may be conjectured that they were not written without a knowledge of the views of the government; and that they were intended to give colour to the distinction on which the explanatory declaration above cited is founded; whether as a measure actually concluded, or projected only, does not appear, the letters having no date in the edition which has appeared in this country.

sanction also of the United States of America in their cruising ordinances. Thus it is seen, that with the exception of Great Britain alone, all the powers of Europe, materially interested in the maritime law of nations, have given a recent and repeated sanction to the right of neutrals to trade freely with every part of the countries at war. And although several of those nations have, on some of the points contained in these treaties, as on the points of contraband and enemy's property under neutral flags, entered since into adverse stipulations; not one of them has by treaty or otherwise relinquished the particular right under consideration,* whilst Great Britain, as we have seen in her treaty with Russia, has herself, expressly acceded to the right.

The importance of treaties in deciding the law of nations, or that portion of it, which is founded in the consent of nations, will justify the extent which has been given to this review of them; and the conclusion which this review justifies is, that the tenor of treaties, throughout the whole period deserving attention, confirms the neutral right contended for; that for more than one and a half centuries, Great Britain has, without any other interruptions than those produced by her wars with particular nations, been at all times bound by her treaties with the principal maritime nations of the world, to respect this right; and what is truly remarkable, that throughout the long period of time, and the voluminous collection of treaties, through which the research has been carried, a single treaty only

* On the contrary these rights have been repeated in the following treaties subsequent to those of the armed neutrality, namely, Russia and Denmark, 8–19 October, 1782—Art. 16, 17, 2 Martens' treaties, 290. Same and the Porte, 10–21 June, 1783—Art. 39, Ib., p. 392. France and Holland, 10th November, 1785—Art. 8, Ib., p. 616. Austria and Russia in the year 1785—Art. 12, Ib., p. 624. France and same, 31st December, 1786—11th Jan., 1787—Art. 26–7, 3 Mart. treat., p. 15. Russia and the king of the Two Sicilies, 6–17 January 1787—Art. 18, Ib., p. 44. Portugal and Russia, 9–20 December, 1787—Art. 22, Ib., p. 117.

(putting aside the explanatory article between Great Britain and Russia, noted above) has occurred, which forms an exception to the general mass.

The exception will be found in an article of a Danish treaty of June, 1691,* with England and Holland. In that article (the 3d) though somewhat obscure, either from inaccuracy in the original text, or in the printed copy, it seems that Denmark relinquished her neutral right of commerce between the ports of France, then at war with the other parties. But this exception, instead of availing in any respect the belligerent claim in question, corroborates the testimony furnished by treaties against it; as will appear from the following observations:

1st. In other parts of the treaty, there are stipulations favorable to Denmark, which may have been regarded as some compensation for the restriction imposed on herself.

2d. Admitting, however, the restriction to have been made without any compensating advantages; the sacrifice might fairly be ascribed to the dreadful oppressions on the Danish commerce, practised by England and Holland, and to the desire of Denmark, as a weaker power, to effect some mitigation of her sufferings. These sufferings cannot be better explained, than by an extract from the preamble to a treaty concluded in 1693, between Denmark and Sweden, for the purpose of putting in force a preconcerted plan of reprisals. "Although their majesties, the kings of Sweden and Denmark had hoped, that after they had concluded their treaty of March, 1691, for maintaining their navigation and commerce, the many unjust piracies exercised on their subjects, would at length have ceased; they have nevertheless been grieved to find that, notwithstanding the reclamations and remonstrances which they have from time to time made to the parties engaged in the war, in order that an end might be put to them, they have rather increased and augmented, even to a point

* Dum., Tom. 7, par. 2, p. 293.

that it is in a manner impossible to express, the pretexts, the artifices, the inventions, the violences, the chicaneries, the processes which have been practised, not only against the vessels and goods of the subjects of their majesties, but also against their public convoys, to the prejudice of the customs and tolls of their majesties, to the considerable diminution of their duties and imports, and to the irreparable injury of their kingdoms and provinces, the subjects of which have suffered and lost infinitely, in their persons, their crews, their vessels, goods and merchandizes. Hence it is that their majesties have been obliged, &c."

Distresses, such as are here painted, might sufficiently account for concessions on the part of a sufferer, without supposing them to flow from a deliberate or voluntary acquiescence in the principle on which they were founded.

3. But admitting the stipulation to have been both gratuitous and deliberate, and to form a fair exception to the general rule of treaties, still being but a single exception to stipulations as numerous and as uniform as have been brought into view, the exception must be considered as having all the effect in confirming the general rule, which can be ascribed, in any case, to a confirmation of that sort.

4. The exception is limited to a trade between one French port and another. It implies, therefore, and recognizes a freedom of trade between foreign and French ports, as well colonial as others.

To this ample sanction, drawn from the conventional monuments of Europe, it will be allowable to add the testimony of the only nation at once civilized and independent, in the American hemisphere. The United States have, or have had, treaties with France, Holland, Sweden, Russia, Spain, and Great Britain.* In all of these, except the treaty with Great Brit-

* To these might be added their treaties with the coast of Barbary, which are all favorable to the neutral rights of commerce. So are various treaties of Great Britain, and of the other powers of Europe, with that coast and with the Ottoman Porte; all of which, as well as

ain, they have positively maintained the principle that neutrals may trade freely between neutral and belligerent ports, and between one belligerent port and another, whether under the same or different jurisdictions; and the treaty with Great Britain contained not even an implication against the principle. It merely omitted a stipulation on the subject, as it did on many others, contained in other treaties.*

### *The Conduct of Other Nations*

The evidence from this source is merely negative; but is not on that account without a convincing effect. If the doctrine advanced by Great Britain had been entertained by other nations, it would have been seen in the documents, corresponding

those with the Asiatic powers, it was thought most proper to omit in this enquiry.

* One of the results of that treaty comprehends a most important sanction from Great Britain, against the doctrine asserted by her. The 7th Article of the treaty stipulated a compensation to citizens of the United States, for the damages sustained from irregular and illegal captures, and established a joint board of 5 commissioners, to decide on all claims, according to equity, justice, and the *law of nations*. These claims were founded in a very great degree on captures authorized by the British instructions of November 6, 1793, and depending, therefore, on the question whether a neutral trade with belligerent colonies, shut in time of peace, was a lawful trade in time of war. The board, on a full consideration, reversed the sentences pronounced even by the admiralty tribunal in the last resort, in pursuance of those instructions; and consequently, as the commissioners were guided by the law of nations, the reversal decided that the instructions and the principle on which they were founded, were contrary to the law of nations. The joint commissioners were appointed, two by each of the parties, and the 5th by lot, which fell on an American citizen. Whether the British commissioners concurred in the decision, does not appear. But whether they did, or did not, the decision was equally binding; and affords a precedent of great weight in all similar controversies, between the two nations. Nor is the authority of the case impeached by the circumstance, that the casting voice was in an American citizen; first, because he was selected and nominated by the British side as an American candidate, possessing their confidence; secondly,

with those which contain the British doctrine. Yet, with all the research which could be employed, no indication has been met with, that a single nation, besides herself, has founded on the distinction between a trade permitted and a trade not permitted in time of peace, a belligerent right to interrupt the trade in time of war. The distinction can be traced neither in their diplomatic discussions, nor their manifestoes, nor their prize ordinances, nor their instructions to their cruizers, nor in the decisions of their maritime courts. If the distinction had been asserted or recognized, it could not fail to have exhibited itself, in some or other of those documents. Having done so in none of them, the inference cannot be contested, that Great Britain is the only nation that has ever attempted this momentous innovation on the law of nations.

*Conduct of Great Britain*

If it be not enough to have shewn, that the belligerent claim asserted by Great Britain is condemned by all the highest authorities on the law of nations, by the clearest testimony of treaties among all the principal maritime nations of the world, herself included, and by the practice of all other nations; she cannot surely demur to the example of her own proceedings. And it is here, perhaps, more than any where else, that the claim ought to shrink from examination. It will be seen, in the course of the following observations, that Great Britain is compelled, under every appeal that can be made to herself, to pronounce her own condemnation; and what is much worse, that the innovation, which she endeavors to enforce as a right of war, is under that name a mere project for extending the field of maritime capture, and multiplying the sources of commercial aggrandizement; a warfare, in fact, against the

because as a man, he was highly distinguished for the qualities fitting him for so independent a station; thirdly, because a joint tribunal so composed, must in every point of view, be less liable to improper bias, than a tribunal established by, and dependent on the orders of one of the parties only.

commerce of her friends, and a monopolizing grasp at that of her enemies.

1st. Whilst Great Britain denies to her enemies a right to relax their laws in favor of neutral commerce, she relaxes her own, those relating as well to her colonial trade, as to other branches.

2d. Whilst she denies to neutrals the right to trade with the colonies of her enemies, she trades herself with her enemies, and invites them to trade with her colonies.

1st. That Great Britain relaxes in time of war her trade laws, both with respect to her colonies and to herself, is a fact which need not be proved, because it is not denied. A review of the progress and modifications of these relaxations will be found in Reeves'* Law of Shipping and Navigation; and in the

* "This is all that I have been able to collect, for illustrating the rules laid down, in the act of navigation and of frauds, for the conduct of the European trade. And having now taken a view of the policy pursued for rendering the foreign trade of the whole world subservient to the increase of our shipping and navigation, I shall draw the reader's attention to another part of the subject; and present to him the instances in which this spirit of prescribing the mode of carrying on foreign trade has been *compelled to yield*, and the execution of our navigation laws has been suspended, lest, in the attempt to enforce them, our commerce might be extinguished, or greatly endangered.

"The laws of navigation, like other laws, have given way to *necessity;* and have been suspended *in time of war*. During the dread of continual danger from an enemy at sea, it is well if foreign trade can be carried on at all; it is no time to be curious at to the build of the ship that is employed in it, how it is navigated, or whence it comes. At such conjunctures *it has been usual*, more or less, to suspend the act of navigation: the first instance of this was in the Dutch war, in the reign of Charles II.

"It was then done, as was common in *those* times, by the prerogative exercised by the crown, of dispensing with laws upon urgent occasions. On the 6th March, 1664, it was found *necessary* to issue an order of council for suspending the act of navigation wholly, as far as regarded the import and export of Norway, and the Baltic sea, and as far as regarded Germany, Flanders, and France, provided the merchants and the owners of the ships were natural born subjects: it was further per-

successive orders of the British council, admitting in time of war neutral vessels, as well as neutral supplies, into her West India colonies. It will not be improper, however, to shew, that in these relaxations of her peace system, she has been governed by the same policy of eluding the pressures of war, and of transferring her merchant ships and mariners from the pursuits of commerce to the operations of war, which she represents as rendering unlawful the like relaxations of her enemies.

The object of dispensing, in time of war, with the navigation act, was avowed by the legislature itself, in the preamble to one of its acts, which was passed not long after the navigation act was adopted. The preamble recites, "And whereas by the laws "now in force, the navigating of ships or vessels in divers cases, "is required to be, the master and three-fourth parts of the "mariners being English, under divers penalties and forfeitures "therein contained: And whereas great numbers of seamen "are employed in her majesty's service for the *manning of the*

mitted to any one of a nation in amity to import from any parts, hemp, pitch, tar, masts, saltpetre, and copper, and to pay duty only as natural-born subjects. English merchants were permitted to *employ foreign ships* in the *coasting* and *plantation trade;* but they were to comply with the restriction of shipping in, and bringing their cargoes to England or Ireland.

"This was letting loose at once most of the restrictions belonging to our navigation system, and throwing it *among the rest of Europe*, to make the best of it, *during the time we were unable* to follow up the plan we had proposed to ourselves.

"In the war of 1740, when we had a war with both France and Spain, it was again *necessary* to relax from the strictness of our navigation laws; but it was endeavored to be done in such a way as would facilitate the carrying on of our trade, without wholly giving up the favorite object of British shipping; and this was, by permitting foreigners to become owners of British ships, and to trade as British subjects.

"In the war with France, beginning in the year 1756, the like law was passed to continue during that war; and again in the year 1779, during the continuance of the then subsisting *hostilities with France.*

"In these temporary expedients, we may trace the progressive increase of British shipping. In the Dutch war of 1664, the nation were

"*Royal Navy*, so that it is become *necessary*, during *the pres-* "*ent war*, to dispense with the said laws, and to allow *a greater* "*number of foreign mariners* for the *carrying on of trade and* "*commerce:* Be it enacted, &c., that during the present war," &c.

Without pursuing the series of similar recitals during successive wars, one other example of later date will be given, in which the same object is avowed. The preamble of 13 G. 2, Ch. 3, is in the following words: "For the better supply of mariners and seamen to serve in his majesty's ships of war, and on board merchant ships and other trading vessels and privateers, and for the better carrying on the present or any future war, and the trade of Great Britain during the continuance thereof," &c.

The British orders of council, and proclamations of governors, issued from time to time during war, and opening, on account of war, the colonial trade to neutrals, in cases where it was shut to them in times of peace, are too well known to require particular recital or reference. Orders to that effect are

obliged at once to abandon the Baltic trade, and to admit *foreign ships into the coasting and plantation trade.* But in the war of 1740 we made no other concession than that of admitting foreigners into the ownership of British-built ships, and to navigate with foreign seamen for carrying the European commodities to this country and *to the plantations.* This was also done in the war of 1756, and in the last war. However, in the last war, pressed as our trade was on all sides, we were *compelled* to yield a little further. Many articles of the trade of Asia, Africa, and America, were permitted to be brought *from any place*, in *any ships* belonging to a nation in amity. But in neither of these wars, not even in the last, when we had the maritime powers of both worlds to cope with, Spain, France, Holland, and America, did we allow foreign ships to participate in the coasting or in the plantation trade."—*Reeves' Law of shipping and Navigation, part 2, chap. 3.*

The reason for not then opening the plantation trade is obvious. The only country furnishing the articles needed, was this country, with which Great Britain was then at war.

In the wars of Great Britain, since the United States have been a neutral country, her colonial trade has been opened to them.

now in operation; and fully justify the position, that, as well in the case of the colonial trade as of the trade with the parent country, the same thing is done by Great Britain herself, which she denies the right of doing to her enemies.

2d. That she trades with her enemies, and invites them to trade with herself, during war, are facts equally certain and notorious.

The efforts of Great Britain to maintain a trade at all times with the colonies of other nations, particularly of Spain, both in peace and in war, and both by force, and clandestinely, are abundantly attested by her own, as well as other historians. The two historians of Jamaica, Long and Edwards, are alone sufficient authorities on the subject.

It has been already noticed, that, in the infancy of her belligerent pretension against the trade of neutrals with the colonies of her enemies, she favored, by special licences, a trade of her own subjects with the same colonies.

The like inconsistency might be verified by a train of examples since the pretension was, during the war of 1793, brought again into action. But it would be a waste of time to multiply proofs of what is avowed and proclaimed to all the world by her acts of parliament; particularly by the act of June 27, 1805, "to consolidate and extend the provisions respecting the free ports in the West Indies."

This act establishes certain free ports in Jamaica, Grenada, Dominica, Antigua, Trinidad, Tobago, Tortola, New Providence, Crooked Island, St. Vincent's, and Bermuda. These ports, distributed throughout the West Indies, with a view to the most convenient intercourse with the colonies, and settlements of her enemies in that quarter, are laid open to all the valuable productions thereof, and to small vessels with single decks, belonging to, and navigated by, inhabitants of such colonies and settlements. In like manner, the enemies of Great Britain are allowed to export from the enumerated ports, rum, negroes, and all goods, *wares*, and *merchandizes*, excepting naval stores, which shall have been imported thither in British ves-

sels. Provision is, at the same time, made for the re-exportation, in British vessels, of the enumerated productions imported from the colonies and settlements of her enemies, to Great Britain and her possessions, according to the regulations prescribed by her navigation act.

In pursuance of the same principle exercised in her laws, we find her entering into a treaty in time of war, which, in one of its articles, opened a branch of colonial trade to neutrals not open to them in time of peace, and which being to continue in force only two years after the end of the war, may be considered as made in effect for the war.

The 12th Article of the treaty with the United States in 1794, stipulated that American vessels not exceeding a given size, may trade between the ports of the United States and the British West Indies, in cases prohibited to them by the colonial system in times of peace. This article, it is true, was frustrated by the refusal of the United States to ratify it; but the refusal did not proceed from any supposed illegality of the stipulation. On the part of Great Britain the article had a deliberate and regular sanction; and as it would not have been a lawful stipulation, but on the supposition that a trade not open in peace may be opened in war, the conduct of Great Britain, in this case also, is at variance with the rule she lays down for others.

But a most interesting view of the conduct of Great Britain will be presented by a history of the novel principle which she is endeavoring to interpolate into the code of public law, and by an examination of the fallacies and inconsistencies to which her Government and her courts have resorted, in maintaining the principle.

It is a material fact that the principle was never asserted or enforced by her against other nations, before the war of 1756.

That at the commencement of the preceding war of 1739, it did not occur, even to the ingenuity of British statesmen labouring for parliamentary topics of argument, is proven by the debate which, on that occasion, took place in the House of Lords.

In the course of the debate on the expediency of the war, this particular point having fallen under consideration, the following observations were made by Lord Hervey against the war:

"Some people may perhaps imagine that great advantages "might be made by our intercepting the Spanish plate fleets, "or the ships that are employed in the trade with their settle- "ments in America, because no Spanish ships can be employed "in that trade; but even this would be precarious, and might "in several shapes be entirely prevented; for if they should "open that trade to the French and Dutch, it is what those two "nations would be glad to accept of, and *we could not pretend* "*to make prize of a French or Dutch ship on account of her being* "*bound to or from the* SPANISH SETTLEMENTS IN AMERICA, *no* "*more than we could make prize of her on account of her being* "*bound to or from any port* IN SPAIN. We could not so much "*as pretend* to seize any treasure or goods (except contraband "she had on board) unless we could prove that those goods "or treasure actually belonged to the King or subjects of "Spain. Thus the Spanish treasure and effects might safely "be brought, &c."

Lord Bathurst in answer:

"We may do the Spaniards much damage by privateering, &c. If they bring their treasure home in flotas, we intercept them by our squadrons; if in single ships our privateers take them. They cannot bring it home either in French or Dutch ships,* because by the 6th Article of the treaty of Utrecht, the

* It was overlooked by both sides in the discussion, that the neutral right to trade with the coasts and colonies of an enemy, and even to cover the property of an enemy, was stipulated by Great Britain to France, in the treaty of Utrecht, 1713, then in force, and to the Dutch in the treaty of 1674, then also in force. If it be said that the omission to notice these treaties was deliberate, and proceeded from a construction of the treaties which excluded from their purview, the colonial trade of an enemy, this presumed accuracy and deliberation of the speakers would strengthen the inference from the omission to cite the principle in question, that the principle was unknown to or disclaimed by them.

King of France is expressly obliged not to accept of any other usage of navigation to Spain and the Spanish Indies, than what was practised in the reign of Charles II, of Spain, or than what shall likewise be fully given and granted at the same time to other nations and people concerned in trade. *Therefore*, the Spaniards could not lay the trade in America open to the French, or at least the French could not accept of it; and if the Dutch should, they would be *opposed by France as well as by us;* an opposition they would not, I believe, chuse to struggle with." *

Through the whole of the debate the subject is taken up, not on the ground of a belligerent right, or of a neutral duty, but merely on that of commercial jealousy and policy. Had the distinction between a trade allowed in peace as well as war, and a trade allowed in war only, been maintained by British statesmen then, as it is maintained by them now, the same ready answer would have been given then, as in a like discussion, would be given now, viz: that neither France nor Holland could enter into a trade with the Spanish colonies, because, being a trade not open in time of peace, it could not be laid open in time of war.

In the debates also, which took place in the House of Lords, concerning the Spanish captures in America, and the war which followed, several of the Lords in their speeches lay down in detail, the cases in which belligerent nations may search, capture, and confiscate neutral vessels in time of war; yet, although colonial trade was the immediate subject of discussion, the distinction now employed, seems never to have entered into the thoughts of the speakers.

Again, in the course of this war to which France became a party on the side of Spain in 1744, it appears that the tribunals of Great Britain proceeded on the same principle, that the trade of neutrals with the colonies of her enemies, though not open in time of peace, might be a lawful trade in time of war.

* Lords' debates, 136, 154.

For this there is the testimony of Robinson's reports, in which it is stated, that ships taken on a voyage from the French colonies, were released before the Lords of Appeal.*

We find then, that prior to the war of 1756, this belligerent claim of attacking all neutral commerce not permitted in time of peace, a claim so broad in its principle and so baneful in its operation, never had a place among the multiplied pretensions enforced by power, or suggested by avarice. At some times nations have been seen engaged in attempts to prevent all commerce whatever with their enemies; at others to extend the list of contraband to the most innocent and necessary articles of common interchange; at others to subject to condemnation both vessel and cargo, where either the one or the other was the property of an enemy; at others to make the hostility of the country producing the cargo, a cause of its confiscation. But at no time, as seems to be admitted by Sir William Scott himself,† was this encroachment on the rights of neutrality devised by any nation until the war of 1756. Then it was that the naval resources of Great Britain augmented by her prosperous commerce, more especially that of her then colonies, now the United States of America, gave her an ascendancy over all her rivals and enemies, and prompted those abuses which raised the voice of all Europe against her.

The first effect of this overgrown power was seen in the bold enterprise of seizing on the whole trade of France within her grasp, in contempt of all forms of commencing hostilities, required by the usage of nations. It was next seen in the extensive depredations on the trade of neutrals, particularly of the Dutch, in defiance not only of the law of nations, but of the most explicit stipulations of treaty. The losses of that single nation, within the first two years of the war, amounted to several millions sterling.‡ The Dutch, by their ambassador at London, remonstrated. The British ambassador at the

* 2 Rob., 122, Am. edit.

† In the case of the Immanuel, 2 Rob., 156, Am. edit.

‡ See Annual Reg., 1757–8.

Hague was instructed to enter into explanations. Among these it came out,* for the first time, that Great Britain meant, notwithstanding the admonitions of prudence as well as of justice, to deny the right of neutrals to carry on with her enemies any trade beyond the precise trade usually carried on in time of peace.

The origin of this novel principle deserves a more particular development. The English Government had no sooner made war on the French commerce, than the Dutch began to avail themselves of their neutral and stipulated rights to enter into it; particularly the commerce of the colonies, both to their own ports, and to French ports. The English immediately made war on this commerce, as indeed they did on the commerce to Spain, Portugal, and other countries. The Dutch vessels were even pillaged on the high seas, and their seamen very badly treated. In the years 1757 and 1758 alone, the number of vessels captured and pillaged amounted to no less than three hundred; and the damages were estimated at eleven millions of florins, between five and six millions of dollars. The Dutch appealed to their treaties with England [those in 1674 and 1675] which made enemy's goods free in their ships, contraband only excepted, and the Dutch trade free from and to the enemy's ports, and from one enemy's port to another. The English were driven to the pretext, that the treaty of 1674 said only that the liberty of trade should extend to all merchandizes which were transported in *time of peace*, those of contraband excepted; and was, therefore, not applicable to the colonial trade in time of war. Besides that *the time of peace*, if it had been any thing more than a mode of expressing the entire freedom of commerce, could refer only to the *kind of merchandizes*, not to the *ports* or *channels* of trade, the Dutch were able to appeal to the declaratory treaty of 1675, which stipulated an unlimited freedom of trade *from* and *to* ports of enemies, without saying any thing as to times of peace.

* Ibid, 1758.

This admitting no reply, the English found no refuge but in the pretext, that the Dutch vessels, being engaged in the colonial trade, were to be *considered as French vessels*. This lucky thought eluded the stipulation that free ships make free goods, as well as that which embraced the right of trade on the coasts and with the colonies of enemies. It was alledged also, but with little seeming reliance on such an argument, that the commerce with the French islands was not known in 1674, and therefore could not be comprised in that treaty. These pretexts being very little satisfactory to the Dutch, the Province of Holland, the chief sufferer, talked of reprisals. The English answer is in Tindal's Cont., vol. 9, p. 577-8. Undertaking to decide on a constitutional question within an independent nation, they said, if the Province of Holland, which had no authority, should fit out ships, they would be treated as pirates; and if the States General should do it, it would be taken as a declaration of war. Such was the birth of this spurious principle.

Being avowed, however, on the part of the Government, it was to be expected that it would have its effect on the courts of admirality. As the decisions of these, during that period, were never reported, the best knowledge of them is to be gathered from references incidentally made to them, in the proceedings of other British courts, and in the proceedings of the high court of admiralty, since the reports of them have been published. The most precise information which has been obtained through the first channel, appears in the case of Berens vs. Rucker, before the court of King's bench, reported in 1 Blackstone, p. 313. This was the case of a Dutch ship which had taken in sugars at sea, off the Island of St. Eustatius, brought along side of her by French boats from a French island; which ship was captured in 1758, on her return with that cargo to Amsterdam. Lord Mansfield in pronouncing on the case in 1760, expressed himself as follows:

"This capture was certainly unjust. The pretence was that "part of this cargo was put on board off Saint Eustatius by

"French boats from a French island. This is now a *settled* "*point* by the *lords of appeals* to be the *same thing* as if they "had been *landed* on the Dutch shore, and then *put on board* "*afterwards*, in which case there is no color for seizure. *The* "*rule is*, that if a neutral ship trades to a French colony with "*all* the privileges of a French ship, and is thus *adopted and* "*naturalized*, it must be looked upon as a French ship, and is "liable to be taken—not so, if she has only French produce on "board, without taking it at a French port, *for it may be pur-* "*chased of neutrals*."

Here the ground of capture must be distinctly noted. It is not that the trade, as a trade allowed in war only, was unlawful, and thence incurred a forfeiture of both ship and cargo; the ground and measure of forfeiture, which are now alleged. The vessel is condemned on the ground, or presumption, that it had, by adoption, been made the *property of the enemy;* whilst the cargo is not liable to condemnation, if not proved to be enemy's property. In other words, the vessel is, in spite of the fact, presumed from the mere circumstance of navigating in a French channel, to be French property; and the cargo, although of French production, and found in a vessel looked upon as French, is notwithstanding these considerations, open to the presumption that it might be neutral property.

This shews only that the Herculean principle was at that time in its cradle; and that neither the extent of its powers, nor the wonders which it was to be called to perform, were at first understood. Its capacities were to be learnt and applied, as they might be unfolded by time and occasions. At that time, neutral vessels being admitted into new channels of French trade by grants of special licences to the vessels, the occasion was thought to be best answered with respect to the vessels, by the presumption, or rather the fiction, that they were French vessels; and with respect to the neutral cargo, as it did not fall precisely under the presumption applied to the vessels, it was left to escape until further time and occasions

should teach the other shapes and uses, of which the innovation was susceptible.

These shapes and uses soon began to disclose themselves: for it appears from the references made in the case of the Providentia,* tried before Sir W. Scott in 1799, that French West India produce, conveyed by neutrals from Monte Christi, a Spanish neutral port, was, in the progress of the war of 1756, condemned, on the pretext that the intervention of a neutral port, was a fraudulent evasion of the rule which condemned the trade with a French port; notwithstanding the previous rule of the Lords of appeal, according to which the landing or even trans-shipment of such produce, at a neutral port, neutralized the trade, and made it lawful.

There is some obscurity, it must be owned, as to the principle on which a neutral trade with the French colonies was condemned, after the discontinuance of special licences; it being sometimes stated in the arguments referring to that period, that the condemnation was founded on the principle, that the trade was virtually or adoptively, a French trade; and sometimes, that it was founded on the general principle that it was a trade not open in time of peace. Certain it is, that the original principle was that of a virtual adoption, this principle being commensurate with the original occasion; and that, as soon as this original principle was found insufficient to reach the new occasions, a strong tendency was seen towards a variation of the principle, in order to bring the new occasions within its reach.

It is remakarble that, notwithstanding the broad principle asserted by the cabinet through its diplomatic organ at the Hague, which interdicted to neutrals every trade not allowed to them in time of peace, the courts of Admiralty not only limited the principle at first, and hesitated afterwards to extend it, in the manner which has been seen; but never undertook to apply it to the *coasting trade*; though so strongly

* 2 Robinson, 120.

marked as a peace monopoly, and therefore so clearly within the range of the principle; nor does it appear, even, that the principle was applied to the trade with the *Spanish* colonies, after Spain joined in the war, notwithstanding the rigorous monopoly under which they are known to be generally kept, in time of peace.

It is still more important to remark, as a proof of the inconsistency always resulting from false principles, and the indulgence of unjustifiable views, that the English themselves, if the Annual Register is to be believed, were acutally trading by means of flags of truce equivalent to licences, both directly with the French islands, and indirectly through Monte Christi, during the very period when they were confiscating the property of neutrals carrying on precisely the same trade, in the same manner.

Such is the state of the question as presented during the war of 1756. The next enquiry relates to the war of the American Revolution, or the French war of 1778.

Here it is conceded on the British side, that the new principle was, throughout that period, entirely suspended. On the other side, it may be affirmed, that it was absolutely abandoned.

One proof is drawn from the course of decisions, in the British high court of Admiralty, by Sir James Marriott, the predecessor of Sir Wm. Scott.

The first volume only of his decisions has yet found its way to this country. In that are contained the cases referred to below;* all of which are adjudged on the principle, that the coasting trade, and of course every other branch of trade, not allowed to foreigners by a nation at peace, and which may be

* The Yonge Helena, a Dutch ship, p. 141.
La Prosperite, or Welfaren, claimed as a Lubecker, p. 170.
Les Quatres Freres, a Danish vessel, p. 180.
The Verenderen, or Le Changement, a Prussian vessel, p. 220.
The Zelden, a Dutch ship, p. 243.
The Dame Catherine de Workeem, a Dutch ship, p. 258.

opened to neutral foreigners by such nation when at war, are lawful trades.

Although some of the ships, in these cases, were Danish, and others Dutch, and consequently within the stipulations of treaties which have been heretofore cited; yet there is no appearance that the Judge was guided in his decisions by that authority; nor is it in the least probable, that they will now be explained by a resort to it. But should such an attempt be made, it could be of no avail; because, among the cases, there are two, one of a Lubeck and the other of a Prussian vessel, which could be decided by no other rule than the general law of nations; there being no British treaty, with either Prussia or Lubeck, applicable to the question. There is another case, a *colonial* one too, decided 21st January, 1779, in which the law of nations must of necessity have been the sole guide. It was that of a French ship, bound from St. Domingo to Nantz. The general cargo, as well as the vessel, were condemned as enemies' property; reserving the question concerning the claims of considerable value, made by two passengers as neutrals, the one asserting himself to be a subject of Bohemia, the other of Tuscany. The articles claimed were ultimately condemned as *enemies' property*; without the slightest allusion to the illegality of a neutral trade between a belligerent country and its colonies; which, if then maintained, as it is now, would at once have put an end to the claims.

It is strictly and incontrovertibly just, then, to say, that these decisions maintain the law of nations as asserted in this investigation; and abandon and renounce it, as asserted in the decisions of the same court, under its present Judge. During the war of 1778, the Judge had no guide whatever in prize cases, turning on this question, but the law of nations. Neither treaties, nor acts of parliament, nor any known orders of council, interposed any special rule controuling the operation of that law. That law, consequently, was the sole rule of the decisions; and these decisions, consequently, complete

evidence of the law, as then understood and maintained by the court: and let it be repeated, that if such was the law in the case of the coasting trade, it was equally the law as to every other channel of trade, shut in peace, and laid open in war.

These decisions were, indeed, made by the high court of Admiralty, and not by the Lords Commissioners of Appeal, the authority in the last resort, on such subjects. But this consideration does not impeach the inference drawn from the decisions; which having not been reversed, nor appealed from, are fair evidence for the purpose to which they are applied. It is impossible to account for an omission to enter appeals, where the captors were in their own country, and must have had the best counsel, without supposing that the appeals afforded not the smallest chance of a more favorable decision.

But as a further and more unexceptionable proof that the principle was abandoned, it is stated by Sir Wm. Scott himself, that "in the case of the Verwagtig,* (a vessel trading between France and Martinique during the war of 1778) and in *many other* succeeding cases, the *Lords of Appeal* decreed payment of freight to the neutral ship owner." This, it must be observed, is a case of colonial trade; and a colonial trade of the most exclusive kind in time of peace; a trade between the colony and the parent country.

To these authorities, an explanation equally singular and unsatisfactory is opposed. It was understood, says Sir William Scott, that "France in opening her colonies, during "the war [of 1778] declared that this was not done with a "temporary view relative to the war, but on a general and "permanent purpose of altering her colonial system, and "of admitting foreign vessels, universally and at all times, "to a participation of that commerce. Taking that to be "the fact, (*however suspicious* its commencement might be, "during the actual existence of the war,) there was no ground

* 1 Rob., 252.

"to say that neutrals were not carrying on a commerce, as "ordinary as any other in which they could be engaged; "and therefore, in the case of the Verwagtig, and many other "succeeding cases, the lords decreed payment of freight to "the neutral ship owner."

At what particular time, and in what particular terms, this important declaration by France was made, is not mentioned; nor has any such declaration been discovered by a search which has been carried through all the French codes, and such of the annals of the time, as were most likely to contain it; and without some further account of this "declaration," or this "profession" on the part of France, as it is elsewhere called in Rob. Reports, it is impossible to decide on the precise character and import of it.

But supposing the fact, as it was taken to be, how account for so unexampled an instance of blind confidence by Great Britain, in the sincerity of an enemy, always reproached by her with the want of sincerity; and on an occasion too, so peculiarly suspicious, as that of a profession at the commencement of war, calculated to disarm Great Britain of a most precious branch of her rights of war?

If her suspension of the new principle is not to be explained by an intentional return to the established law of nations; and the explanation of the fact lies in the alternative between her respect for a suspicious declaration of France, made in the suspicious crisis of a war, more than any other charged by her on the perfidious ambition of France; and her respect for those prudential motives which her own situation may have suggested for abandoning, rather than renewing, the attempt to maintain such a principle; it will not be easy to avoid preferring the explanation drawn from the following review of her situation.

However bold it may have been in Great Britain to advance and act upon the new principle in the war of 1756, it has been seen that she went but a small part of the length of it; and with an evident desire to make the innovation as little con-

spicious and obnoxious as was consistent with her object. In this caution she was probably influenced by a regard, not only to the progress of opinion in Europe in favor of neutral rights; but particularly to the King of Prussia, whose friendship she courted, and who was known to be a patron of those rights. His dispute with Great Britain, produced by her seizure of Prussian vessels in the preceding war, and by his seizing in return, the Silesian funds mortgaged to Great Britain, is well known. The issue of this dispute has been represented as a complete triumph of the belligerent claims of Great Britain, over the pretensions of the neutral flag. The fact, however, is, that she was obliged to redeem the Silesian debt from the attachment laid on it, by paying to Prussia the sum of 20,000 pounds sterling, as an indemnity for the prizes made of Prussian ships.*

At the commencement of the war of 1778, the public opinion had become still more enlightened and animated on the subject of neutral rights. The maritime success of Great Britain in the war of 1756, had alarmed, and the abuses of her power had sharpened the feelings of every commercial nation. Champions had started up all over Europe, maintaining with great learning and strong reasoning, the freedom of the seas, and the rights of the neutral flag. The principle that free ships make free goods, more especially employed a variety of very able pens; and had made a rapid progress. Other principles, the offspring or auxiliaries of this, and equally adverse to the maritime claims of Great Britain, were also gaining partizans. In a word, that state of fermentation in the public mind was prepared, which being nourished by the example and the policy of France, enabled Russia, in concert with France, to unite and arm all the maritime nations of Europe, against the principles maintained by Great Britain. To these discouraging circumstances in the situation of Great Britain, it must be added, that the cause in which

* The instrument containing this stipulation bears date January 16, 1756. It may be seen in Jenkinson's collection of treaties.

she was fighting against her colonies, who had separated from her, was unpopular; that their coalition with her enemies, weakening her and strengthening them, had a double effect in depressing her; and that it happened, as was to be foreseen, that the fleets and cruisers brought against her, and the distress to which her own West Indies were reduced by her inability to supply their wants, made it questionable, whether she might not lose, rather than gain, by renewing the principle which she had formerly asserted. Early in that war, Mr. Burke, in the House of Commons, exclaimed, "we are masters of the sea, no farther than it pleases the house of Bourbon to permit."

The effect of this state of things, in tempering the policy and pretensions of Great Britain during the war of 1778, is attested by a series of her public acts too tedious to be here inserted, but which may be seen in Hennings' collection.

But to whatever causes, the relinquishment by Great Britain of the new principle, is to be ascribed, the fact of the relinquishment remains the same; and that it did not proceed from any declaration made by France, that she had permanently abolished her colonial monopoly, is fully demonstrated by the following considerations.

The fact is, that such a declaration, or such an abolition by France, however satisfactory the evidence of it might be to the British Cabinet, could have no legal effect on the decisions of a Court, without some notification of instruction which is not pretended; and which is sufficiently contradicted, by the guarded terms used by Sir William Scott in speaking of the declaration. And that the then judge of the court, Sir James Mariott, was not in fact influenced in his decisions, either by the declaration of France itself, or by any instruction of his own government founded on such a declaration, is put beyond the possibility of doubt, not only by the want of reference thereto in the decisions, but by an acknowledgment made by Sir William Scott, in the case of the Emanuel in 1799, (1 Rob., p. 253;) the case of a neutral vessel carrying

from one Spanish port to another, salt owned by the king of Spain, then at war with Great Britain. "With respect to authorities (says he) it has been much urged, that in three cases, *this war*, the Court of Admiralty has decreed payment of freight to vessels so employed: and I believe that such cases did pass, under an intimation of the opinion of the very learned person who preceded me, in which the parties acquiesced, without resorting to the authority of a higher tribunal." If the decisions of Sir James Mariott in the war of 1778, had been guided by the declaration of France, and not by the law of nations, it is evident, as that delcaration was inapplicable to the war of 1793, and had even been falsified on the return of peace in 1783, as stated by Sir William Scott himself, that the opinion intimated by Sir James Mariott with respect to cases, Spanish too, and not French cases, in the beginning of the war of 1793, could have no other basis than the principle, that according to the law of nations taken by itself, the trade of neutrals on belligerent coasts was a rightful trade.

Secondly. Were it admitted that a declaration by France had been so made and communicated, as to become a rule binding on the admiralty court, it is clear that the rule must have been restricted to cases of trade with the *French colonies*, and could have no effect on those of a trade with *Spanish* or *Dutch* colonies, whose governments had made no such declaration as is attributed to France: yet it is not pretended, nor is it known, that any distinction was made by the British courts, between the former and latter cases. The principle in question seems to have been equally renounced in all.*

* Hennings, a Danish writer, alluding to the period of the war of 1778, says, "But although in respect to the neutral trade to the colonies in America, since France has permitted it to all nations, nothing has been expressly conceded by Great Britain, yet the courts of admiralty have released all prizes which had been brought in, as coming from the French or Dutch possessions in America; and the commerce of neutrals with the colonies, has been generally permitted. This permission, therefore, may be considered as a settled point."—Treatise on Neutrality, p. 58.

Thirdly. The alleged change in the system of France was restricted to her *colonies*. It is not pretended that any permanent change was either made, or declared in the system of her coasting trade. But the decisions of the British court above cited, relate principally to the coasting trade. The principle then must have been drawn, not from the alleged change of France, but from the law of nations: and if the law of nations authorized in the judgment of the court, a coasting trade shut in peace and opened in war, it must have authorized, in the same judgment, the colonial and any other trade shut in peace and opened in war.

It is an inevitable conclusion, therefore, not only that the trade of neutrals to belligerent coasts and colonies, was sanctioned by the British courts, throughout the war of 1778, but that the sanction was derived from the law of nations; and, consequently, that the new principle, condemning such a trade, was not merely suspended under the influence of a particular consideration which ceased with that war, but was, in pursuance of the true principle of the law of nations, judicially abandoned and renounced.

Passing on to the war of 1793, it appears, however, that the policy of the British government, yielding to the temptations of the crisis, relapsed into the spirit and principle of her conduct towards neutral commerce, which had been introduced, in the war of 1756.

The French revolution which began to unfold itself in 1789, had spread alarm through the monarchies and hierarchies of Europe. Forgetting former animosities, and rival interests, all the great powers on the continent were united, either in arms or in enmity, against its principles and its examples: some of them, doubtless were stimulated, also, by hopes of acquisition and aggrandizement. It was not long before the British government began to calculate the influence of such a revolution, on her own political institutions; as well as the advantages to which the disposition of Europe, and the difficult situation of her ancient rival and enemy might be turned. War was, in-

deed, first declared by the French government; but the British government was, certainly, the first that wished it, and never perhaps entered into a war against France, with greater eagerness, or more sanguine hopes. With all Europe on her side, against an enemy in the pangs of a revolution, no measure seemed too bold to be tried; no success, too great to be expected.

One of her earliest measures was accordingly that of interdicting all neutral supplies of provisions to France, with a view to produce submission by famine.*

The project, however, had little other effect, than to disgust those most interested in neutral commerce, and least hostile to France. This was particularly the case with the United States, who did not fail to make the most strenuous remonstrances against so extraordinary a proceeding. The correspondence of their Secretary of State with the British plenipotentiary, (Mr. Hammond), and of Mr. Pinckney the American plenipotentiary with Lord Grenville, the British Secretary of State, are proofs of the energy with which the innovation was combated, and of the feebleness and fallacy with which it was defended. The defence was rested on a loose expression of Vattel. Bynkershoeck, who had not altogether got rid of the ideas of the former century, and by whom Vattel probably was misled, could have furnished a still stronger authority.†

The next experiment of depredation on neutral commerce was directed, notwithstanding the former abandonment of the principle, and the continuance of the abandonment into the early cases of the war ‡ of 1793, against that carried on with the

* See instructions of June 8, 1793.

† Frumentum scilicet etiam non hostis, ad hostem recte advehit, excepta obsidionis *famis-ve* causa.—Lib. I, Cap. 9.

‡ The Charlotte, Coffin, an American vessel, taken on a voyage from Cayenne to Bordeaux, October, 1793, and reserved with a class of like cases, prior to the instructions of November, 1793, was tried and decided by the Lords of appeal in 1803. On the side of the claimants it was argued, that considering the *changeable ground* on which the

possessions of France in the West Indies. This experiment too fell with peculiar weight on the United States. For some time the irregularities went on, without any known instructions from the government reviving the abandoned principle; but without the licentious excesses which followed.

As early, however, as November 6, 1793, instructions were issued, which struck generally at the neutral commerce with the French West Indies. That of the United States was the principal victim. The havoc was the greater, because the instructions being carried into operation before they were promulged, took the commerce by surprize.

This instruction of November 6th, 1793, was addressed to the commanders of ships of war, and to privateers having letters of Marque against France, in the following terms:

"That they shall stop and detain all ships laden with goods the produce of any colony belonging to France, or carrying provisions or other supplies for the use of any such colony, and

principle, condemning a trade in war not permitted in peace, was *first established in* 1756, and the *apparent abandonment* of it during the war of 1778, neutral merchants were entitled to the benefit of a justifiable ignorance, until the instructions of November, 1793, had conveyed an admonition to them: on the other side it was contended that the principle was *sufficiently obvious* as a *principle of public law*, without any instructions, and that neutrals had no right to presume that relaxations confined to circumstances of the war of 1778 [on which subject by the way it was impossible they could have any knowledge] would be continued. The court concurring in this view of the case, pronounced the ship and cargo with the others in the like situation, subject to condemnation. 4 Rob., Appendix, p. 12. As the state of appearances had misled the "very learned person" who preceded Sir William Scott, into an opinion that the neutral trade, though not permitted in peace, was lawful in war, it was surely rather a hard sentence that refused to unlearned traders a plea of ignorance, of which so very learned an expositor of the law is obliged to avail himself. Besides, if "the principle was sufficiently obvious," why were the cases depending on it reserved, and above all, why were the parties kept in uncertainty and expense for ten years, and till the war was over? These are questions which it is more easy to ask than to answer.

shall bring the same with their cargoes to legal adjudication in our courts of admiralty."

In some respects this instruction went farther than the new principle asserted by Great Britain; in others it fell short of that principle.

It exceeded the principle in making the *produce* of a French colony, although owned by neutrals, and going from a neutral port where it might have been regularly naturalized, the criterion of the trade. The principle would have extended only to produce exported *immediately* from the colony, in a trade not permitted in time of peace.

Again, the principle was not applicable to an immediate trade from certain ports* and places in the colonies, authorized by permanent regulations antecedent to the war. The instruction extends *to any colony*, and consequently violates a trade where it was permitted and customary before the war.

On the other hand it falls short of the principle, in as much— 1, as it spares articles directly exported from, though not the produce of, the colonies—2, as it does not affect the coasting trade of France, and other branches of French trade, laid open in time of war, on account of the war.

With these mitigations, however, the instruction had a sweeping operation on the neutral commerce with the French colonies, carried on chiefly from the United States.

The resentment produced by it, and which was doubled by the ensnaring concealment of the instruction, appeared not only in the outcry of the suffering merchants, but in the discussions and proceedings of the government. Important restrictions on the commerce of Great Britain were agreed to by one branch of the Congress, and negatived by a single vote in the other. A sequestration of British funds and effects in the United States was proposed and strongly supported. And an embargo withholding supplies essential to the subsistence of the British West Indies, actually passed into a law, and re-

* See the French free port act of 1784, in force in 1793.

mained in force for some time. These measures, at length, gave way to the mission of a plenipotentiary extraordinary to the British court, which terminated in the treaty of 1794.

The British government, in the mean time, aware of the powerful tendency of such depredations, to drive the United States into a commercial, if no other warfare, against her, prudently retreated from the ground taken by this instruction, as early as the 8th of January, 1794, when she revoked the instruction to her cruisers, of November 6th, 1793, and subtituted the following:

"1. That they shall bring in for lawful adjudication all vessels with their cargoes, that are loaded with goods the produce of the *French West India Islands*, and *coming directly* from any port of the said islands to any port in *Europe*."

"2. That they shall bring in for lawful adjudication, all ships with their cargoes, that are loaded with goods the produce of the said islands, the property of which goods shall belong to subjects of France, to whatsoever ports the same may be bound."

"3d. That they shall seize all ships that shall be found attempting to enter any port of the said islands that is, or shall be, blockaded by the arms of his majesty or his allies, and shall send them in with their cargoes for adjudication, according to the terms of the 2d article of the former instructions, bearing date the 8th day of June, 1793."

"4th. That they shall seize all vessels laden wholly or in part with naval or military stores, bound to any port of the said islands, and shall send them into some convenient port belonging to his majesty, in order that they, together with their cargoes, may be proceeded against according to the rules of the law of nations."

As the three last articles cannot be regarded as any relaxation or re-modification of the instructions of November, 1793, since they relate only to principles well known to have been long enforced by Great Britain, as a part of the law of nations, it is not easy to discern the motive to them. The only effect

of the articles, as an enumeration and definition of belligerent rights, in certain branches of trade, seems to be, to beget perplexing questions with respect to these rights, in the branches of trade pretermitted.

The material article is the first. It varies the preceding instructions in three respects: 1st, in substituting "the French West India islands" for "any colony of France;" of which there are some not *islands*, and others not *West India* islands: 2d, in limiting the seizure, to produce "*coming directly*" from any port of the said islands: 3d, in the very important limitation of the seizure, to vessels bound from those islands to any port in *Europe*.

By these limitations it was, apparently, intended to take the direct trade from the French West Indies to the United States, out of the operation of the order of 1793: and, probably also, the trade from the United States to the West Indies; leaving the trade *to Europe*, from the French West Indies, a prey to British cruisers. Whether it was also meant. as seems to be implied, that the neutral trade from Europe to the French West Indies was to be undisturbed, is a distinct question. This question was actually raised under the ambiguity of the instruction, and decided, not without some marks of self distrust, by Sir Wm. Scott, in the case of a trade from France herself to a West India colony.*

The explanation of this change in the instructions of the British Government is given, by the Reporter of Sir Wm. Scott's decisions, in the following passage extracted from the appendix to 4 Rob., p. 4: "The relaxations that have since [the instructions of November 6, 1793] been adopted, have originated chiefly in the change that has taken place in the trade of that part of the world, since the establishment of an independent Government on the continent of America. In consequence of that event, American vessels had been admitted to trade in some articles, and on certain conditions,

* Immanuel, 2 Rob., 156.

with the colonies both of this country and of France. Such a permission had become a part of the general commercial arrangements, as the ordinary state of their trade in time of peace. The commerce of America was therefore abridged by the *foregoing instructions*, and debarred of the right generally ascribed to neutral trade in time of war. that it may be continued with particular exceptions, on the basis of its ordinary establishment. In consequence of representations made by the American Government, *to this effect*, new instructions to our cruizers were issued, 8th January, 1794, apparently designed to exempt American ships trading between their own country and the colonies of France."

One remark suggested by this explanation is, that if it be a just defence of the orders of January, 1794, it is a severe imputation on those of November, 1793; for the sole reason which is stated, as requiring this revocation of the orders of 1793, was in existence at the date of those rigorous orders; and ought, therefore, to have prevented them. Yet they were not only not prevented, but were permitted to have a secret and extensive operation on the American commerce. Nor does it appear, that in any of the decisions on the captures made within that period, conformably to the instructions, but contrary, as is here admitted, to the law of nations, which, on the British principle, authorized the American commerce, at least as far as it had been actually enjoyed with the French, in time of peace, the court ever undertook to modify the instructions; as is alleged to have been done, in the war of 1778, in consequence of the professions of France that she had opened her colonial ports, generally, to the permanent trade of other nations.

The explanation calls for two other remarks. The first is, that the instruction goes beyond the reason assigned for it. The reason assigned is, that the trade between the United States and the French islands had, by the permission of France, become "the ordinary state of their trade in time of peace." Now so far as this was the fact, the trade is expressly and

truly stated, in the explanation itself, to have been limited to "some articles," and "on certain conditions." But the instruction is admitted to have been designed to exempt, without any such limitations, American ships trading between their own country and the colonies of France.

The second remark is, that it is not a fact, that the *representations of the American Government* were made *to the effect* here stated; namely, that the instructions of 1793 debarred them of the right of trading with the French colonies in time of war, *according to the ordinary state of the trade* permitted to them *in time of peace*. The representations of the American Government recognized no such principle, nor included any such complaint; as is proved by official documents * on the subject.

A third remark might be added. If the ordinary permissions of France to trade with her colonies, was a good reason for exempting the trade of the United States from the order of November, 1793, the exemption ought to have been coextensive with the permissions; and, consequently, to have embraced the *neutrals of Europe*, who enjoyed the same permissions as the United States; instead of being restricted to the latter.

* Among the printed documents of that period is a letter of January 9, 1794, from Mr. T. Pinckney, the American Minister at London, to Mr. Jefferson, then Secretary of State, in which, alluding to an interview with Lord Grenville, he says, "I reminded him that our ideas differed materially from theirs on this subject; and without repeating the arguments I had before addressed to him, both verbally and in writing, in support of our position, it was only necessary to say, that we did not admit the right of the belligerent Powers to interfere further in the commerce between neutral nations and their adversaries, than to prevent their carrying to them articles, which, by common usage, were established as contraband, and any articles to a place fairly blockaded; that consequently the two first articles, though founded upon *their principles*, of not suffering, in war, *a traffic which was not admitted by the same nations in time of peace*, and of taking their enemy's property when found on board of neutral vessels, were nevertheless contrary to what *we contended* to be *the just principles* of the modern law of nations."

One is really at a loss, which most to admire, the hasty and careless facility with which orders proceed from the Government of a great and an enlightened nation, laying prostrate the commerce and rights of its friends; or the defective and preposterous explanations given of such orders, by those who undertake to vindicate or apologize for them.

But whatever may have been the origin, or the intention of the second orders of 1794, revoking the restraints imposed by those of 1793, on the United States; whilst they suffered those restraints to continue, in great part at least, on other nations; two consequences resulted, which seem not to have been taken sufficiently into foresight.

One of them was, that the nations of Europe, excluded from the trade not forbidden to the United States, were not a little soured by the distinction; and which, very possibly, may have contributed to the revival of the sympathies which brought about the armed neutrality of 1800.

The other was, the vast growth of the carrying trade of the United States, which supplied all parts of Europe, with the produce of the West Indies, and without affording to Great Britain any of the profits of an entrepot.

The development of these consequences could not fail to awaken the attention of the British Government, and is the best key to the instruction which was issued January 25, 1798; and which was extended to the possessions of Spain and Holland, then united with France against Great Britain.

It revoked the instructions of January, 1794, reciting as the consideration which rendered the alteration expedient, "the present state of the commerce of Great Britain, as well as that of neutral countries;" and in lieu thereof, the following was issued:

"That they should bring in for lawful adjudication, all vessels with their cargoes, that are laden with goods, the produce of any island or settlement belonging to France, Spain, or the United Provinces, and coming directly from any port of the said islands or settlements, *to any port in Europe, not being a*

*port of this kingdom, nor a port of that country, to which such ships, being neutral ships, shall belong.*" The residue of the articles merely extend to the islands and settlements of France, Spain, and Holland, the three last articles in the instructions of January, 1794.

The effect of this new change in the instructions was, to sanction a direct trade from *all* the French islands, as well as from those in the *West Indies*, and also from the French *settlements* which were not islands, with a like sanction, to a like trade, from the islands and settlements of the other enemies of Great Britain; to extend to neutrals in Europe, the enjoyment of this trade, with a refusal to the American States, of the *direct trade*, from those islands and settlements to such European neutrals; and finally, to permit to these States, as well as to the neutrals of Europe, a direct trade from the hostile islands and settlements *to Great Britain herself.*

The explanation attempted by the reporter, Dr. Robinson, in his appendix to the 4th vol., p. 4–5, is, that "In consequence of the relaxation [in 1794] of the general principle in favor of *American* vessels; a similar liberty of resorting to the colonial market, for the supply of their own consumption, was conceded to the *neutral* States of *Europe*, a concession rendered more reasonable by the events of war, which, by annihilating the trade of France, Spain, and Holland, had entirely deprived the States of Europe of the opportunity of supplying themselves with the articles of colonial produce in those markets."

With regard to the *permission to all neutrals* to convey the produce of the enemies' colonies, directly to *British ports*, he is silent.

From a summary, however, of the discussions which had taken place on cases before the Lords of Appeal, as it is given in the appendix to 4 Rob., p. 6, an explanation of this part of the regulation, might be easily collected, if it were not otherwise sufficiently obvious. Among the arguments used for so construing the last order of 1798, as to justify a Danish vessel in trading from a Spanish colony, to a neutral country, to which the vessel *did not belong;* it is observed, "that, origin-

ally, the pretension to exclude *all neutrals*, was uniformly applied on the part of the belligerent; by which the effect *of reducing* such settlements *for want of supplies*, became a *probable issue of the war; now*, since the relaxations have conceded to neutral merchants the liberty of carrying thither cargoes of innoxious articles, and also of withdrawing the produce of the colony, for the purpose of carrying it to their own ports; *now*, to restrict them from carrying such cargoes *directly to the ports of other neutral States*, becomes a rule apparently capricious in its operation, and one, of which the policy is not evident. From the northern nations of *Europe*, no apprehensions are to be entertained of a *competition injurious to the commercial interests of our own country*. To exclude *them* for this mode of traffic [that is of trafficking directly from such colonies to other neutral countries] in the produce of the enemy's colonies, is to throw a *farther* advantage into the hands of *American* merchants, who can, with greater ease, import it first into their own country, and then, by *re-exportation*, send it on to the neutral nations of Europe."

No other key is wanted to let us into the real policy of the orders of 1798; which placed the neutral nations of Europe, and the United States on the same footing, by extending the rights of the former, and thereby abridging the advantages of the latter. This change of "the actual state of the commerce of this country (G. B.) as well as that of neutral countries" was expedient for two purposes: It conciliated the Northern nations, then perhaps listening to a revival of the armed neutrality, and *from whom* "no apprehensions were to be entertained" of an injurious competition with the commercial interests of Great Britain; and at the same time, it so far took the advantages of re-exportation out of the hands of the American merchants, from whom such a competition, probably was apprehended.

But a mere adjustment of the balance between neutrals in their advantageous trade with the enemy colonies, did not answer all the purposes which were to be consulted. It gave Great Britain herself, no share of the forbidden fruit. She

took at once, therefore, the determination, whilst she would permit none of the neutral merchants of any country to carry on this colonial trade of her enemies with another neutral country, to authorize them *all* to carry it on *with herself*; disguising, as well as she could, the policy of making herself the centre and thoroughfare of so extensive a branch of profit, under the general expediency of changing "the state of commerce both British and neutral" as it had resulted from her regulations of 1794; and avoiding, as much as she could, to present to notice, the palpable inconsistency of making herself a party to a trade with her colonial enemies, at the very moment when she was exerting a belligerent pretension, having no other basis, than the probable reduction of them, by suppressing all trade whatever with them.

This subject is too important not to be a little further pursued. Unpleasant as the task is, to trace into consequences, so selfish and so abounding in contradictions, the use made by Great Britain of the principle assumed by her, the development is due to truth and to the occasion. It will have the important effect, at the same time, of throwing further light on the checkered scene exhibited by the admiralty jurisprudence of Great Britain.

It must be added then, that the *commercial policy* for which she employs her new *belligerent* principle, is the more apparent from two subsidiary pretensions, as new, as they are at variance with the maritime rights of neutral nations.

The object of *drawing* through her own warehouses and counting-houses, the colonial trade of her enemies, on its way from the West Indies to the other countries of Europe, being counteracted by the extensive intercourse between the United States and those colonies, and by the re-exportation from the United States, of the imported surplus of colonial produce, the project was adopted, of *forcing* this trade directly from the West Indies to, and through Great Britain; 1st, by checking the West India importations into the United States, and thereby lessening the surplus for re-exportation; 2d, by embar-

rassing the re-exportation from the United States; both considerations seconded, no doubt, by the avidity of her cruizers and by the public interest, supposed to be incorporated with their success in making prizes; and the first consideration, seconded also, perhaps, by a desire to give an indirect check to the exportation of contraband of war from the United States.

In order to check importations, the principle is advanced, that the outward and the return voyage are to be regarded, as forming but a *single voyage*; and consequently, if a vessel is found with an innocent cargo on board, but on her return from a hostile port, her outward cargo to which, was as contraband of war subject to capture, the vessel is thereby rendered liable to capture, and the chance for capture, by that means, doubled.

That this principle is of modern date, can be shewn by more than negative evidence; and from a source highly respectable. When Sir L. Jenkins was judge of the high court of admiralty, in the latter period of the 17th century, it was the practice, sometimes for the king, at others for the commissioners of appeal, to call for his official opinions in writing, on cases depending in other courts, or diplomatically represented to the government. These rescripts are valuable, not only as one of the scattered and scanty materials composing the printed stock of admiralty precedents in Great Britain; but as the testimony of a man, who appears to have been not undeservedly regarded as an oracle in his department of law; and to have delivered his opinions with a candor and rectitude, the more meritorious as he served a sovereign who gave little encouragement to these virtues, and as he was himself of a temper and principles sufficiently courtly.

The case of a Swedish vessel, which had conveyed enemy's goods, having been seized on her return, with neutral goods, was represented to the government by the Swedish Resident; and by the Government referred to Sir L. Jenkins, the judge of the high court of admiralty. His report is so interesting

in another respect, as well as that for which it was required, that it shall be given in his own words:

"The question which I am (in obedience to his Majesty's most gracious pleasure) to answer unto, being a matter of fact, I thought it my duty not to rely wholly on my own memory or observation, but further to inquire of Sir Robert Wiseman, his majesty's advocate general; Sir William Turner, his royal highness, the lord high admiral's advocate; Mr. Alexander Check, his majesty's proctor; Mr. Roger How, principal actuary and register in the high court of admiralty in England; whether they, or any of them, had observed, or could call to mind, that in the late war against the Dutch, any one ship otherwise free, (as belonging to some of his majesty's allies,) having carried goods belonging to his majesty's enemies, *from one enemy's port to another*, and being seized (after it had discharged the said goods) *laden with the proceeds of that freight* which it had carried and received of the enemy upon the account of the ship's owners, had been adjudged prize to his majesty; they all unanimously resolved that they had not observed, nor could call to mind that any such judgment or condemnation ever passed in the said court; and to this their testimony I must (as far as my experience reaches) concur: and if my opinion be (as it seems to be) required, I do not (with submission to better judgment) know any thing, either in the statutes of this realm, or in his majesty's declarations upon occasion of the late war, *nor yet in the laws and customs of the seas*, that can (supposing the property of the said proceed to be *bona fide* vested in the ship owners his majesty's allies) give sufficient ground for a condemnation in this case. And the said advocates (upon the debate I had with them) did declare themselves positively of the same opinion. Written with my hand this 6th day of February, 1667."* Sir L. Jenkins' works, 2 vol., p. 741.

* The works of Jenkins have become so scarce, that it were to be wished that the parts at least, which contain his admiralty opinions and decisions, were republished. Considering the luminous character,

Here the point is clearly established, that a vessel found with a lawful cargo, on a return voyage, cannot be affected by the unlawfulness of the cargo immediately preceding it; and, consequently, that an outward and return voyage, cannot be considered as but one voyage, or the character of one as transfused into the other.

It is true that, in this case, the cargo in question was not contraband of war, but enemy's property. But there is no room for a distinction in the principle applicable to the two cases. If the two voyages in fact make one and the same voyage in law, an outward cargo of enemy's property must authorize capture in the returned voyage as much as an outward cargo of contraband would authorize it. If the two voyages do not make one and the same; the contraband of war in one voyage, can no more affect another voyage, than enemy's property, in one voyage, can effect another voyage.

It will not have escaped attention that, in the case stated in the report of Jenkins, the voyage in which enemy's property

and the official weight belonging to them, it might have been expected that this would long ago have been done; as well as that his authority would have been more frequently consulted in admiralty proceedings. Perhaps one cause of the neglect may lie in the difference which would be exhibited between his testimony of the law of nations, and the expositions of modern date, on some other points beside that in the text. For example, in defining contraband, he limits it to things "*directly* or *immediately*" subservient to the uses of war; and expressly decides "pitch and tar" not to be contraband. By what authority has the law of nations been changed in this particular? Certainly, not by an *unanimous* consent of nations, as was required by Great Britain to change the law subjecting enemy's property under a neutral flag, to confiscation; the contrary being admitted by Sir William Scott, who remarks that this was a point, though not the only point of British difference from the tenets of Sweden. 4 Rob., 201. With respect to tar and pitch, it cannot even be pretended, that any change in the uses of these articles, since that date, can have changed the reason of the rule, as it existed in the time of Jenkins; or that the change was merely an adaptation of the same general principle to particular circumstances: for tar and pitch had the same relation to ships, and ships the same relation to war, then as they have now.

had been carried, and which it was imagined might thence have vitiated the return voyage, was a *coasting* voyage from one enemy's port to another. Yet so immaterial was *that circumstance*, at *that time*, that it appears not even to have been taken into his consideration, much less to have influenced his opinion. Had it been otherwise, it would indeed have made his decision so much the stronger against the amalgamation of two voyages, on account of the unlawfulness of one of them: for on that supposition the first of the two voyages would have been doubly unlawful, as engaged both in carrying enemy's property, and in carrying it from one enemy's port to another.

But this particular principle is not only of modern date, but of very recent date indeed. Its history, like that of many other belligerent innovations by Great Britain, is not unworthy of attention.

In December, 1798, in the case of the Frederick Molke, a Danish vessel that had got into Havre, then deemed in a state of blockade, and was taken on her way out, August 18th, 1798, it was urged to be like the case of a return voyage, where the cargo of the outward voyage had been contraband. Sir William Scott admitted that, in the latter case, "*the penalty does not attach on the returned voyage*," but denied the affinity between the cases: "there is this essential difference," said he, "that in *contraband* the offence is *deposited with the cargo* whilst in such a case as this, it is continued and *renewed* in the subsequent conduct of the ship;"* the act of *egress* being, according to him, as culpable as the act of ingress.

In August, 1799, in the case of the Margaretha Magdalena; a vessel returning to Copenhagen from Batavia, her outward cargo having consisted of contraband goods, was seized at St. Helena, September, 1798. On the ground, however, that the ship and cargo were neutral, and that the outward shipment from Copenhagen was contingent and not absolutely for Batavia, but sent under the management of the master to invest the proceeds in the produce of Batavia, restitution was decreed by

* 1 Rob., p. 72.

Sir William Scott, notwithstanding the fact that the contraband "articles were *actually sold at Batavia*," with a remark only, that there was great reason to bring this case to adjudication, as a case very proper for enquiry. On this occasion the judge made the following observations: "It is certainly an alarming circumstance in this case, that although the outward cargo appears to have consisted of contraband goods, yet the principal owner appears publicly at Copenhagen, and makes oath, "that there were no prohibited goods on board, destined to the ports of any party now at war." The master himself describes the cargo that he carried out as *naval stores*, and in looking into the invoice I find that they are there represented *as goods to be sold*. That being so, I must hold that it was a most noxious exportation, and an act of very hostile character, to send out articles of this description to the enemy, in direct violation of public treaties, and of the duty which the owners owe to their own government. I should consider it as an act that would *affect the neutral in some degree* on this *returned voyage*, for although a ship *on her return* is not liable to confiscation for having *carried a cargo of contraband* on her *outward voyage*, yet it would be a little too much to say, that *all impression* is done away; because if it appears that the owner had sent such a cargo, under a certificate obtained on a false oath, that there was no contraband on board, it could not but affect his credit at least, and induce the court to look very scrupulously into all the actions and representations of such a person." *

That the judge was beginning to be a little unquiet under the rule imposed on himself, not to consider a ship on her return voyage as liable to confiscation for having carried a cargo of contraband on her outward voyage, is sufficiently visible. He is found, nevertheless, still submitting to the restriction.

The case of the Immanuel succeeded November 7th, 1799. It is the case of a Hamburg ship, taken 14th August, 1799, on

* Rob., p. 116, 117.

a voyage from Hamburg to St. Domingo, having in her voyage touched at Bordeaux, where she sold part of her cargo, and took a quantity of other articles for St. Domingo. The question was started, whether the stores which had been discharged at Bordeaux, though originally destined for St. Domingo, were contraband or not. The inference of the judge was, that they were not of a contraband nature, at least that they were left ambiguous, and without any particular means remaining of affording a certainty upon the matter. "If so," said he, "it is useless to imagine what the effect of contraband, in *such circumstances*, would have been. I shall say no more, than that *I incline to think* that the discharge of the goods at Bordeaux would have extinguished their powers of infection. It would be an extension of this rule of infection, not justified by any former application of it, to say, that after the contraband was actually withdrawn, a mortal taint stuck to the goods, with which it had once travelled, and rendered them liable to confiscation, even after the *contraband itself was out of its reach*." *

This was not indeed a return voyage, but one link of an outward voyage. The reason, however, given why contraband, after being discharged, could not leave a confiscating taint on the expedition, namely, because itself was out of the reach of confiscation, is precisely common to the two cases; yet it would seem that the judge is becoming not a little languid in maintaining the opinion, "that the offence of contraband is deposited with the cargo." He now "*inclines to think* that such would be the effect."

February 5, 1800, the case of the Rosalie and Betsey, was that of a ship taken May 31, 1799, on a voyage from the Isle of France, asserted to be to Hamburg. It was made a question of property, turning on a question of fraud; the fraud in the returned voyage was held to be reinforced by the fraud in the outward voyage; and that fraud is stated by Sir William Scott, "as more noxious on account of the *contraband nature* of several of the articles of the *outward* cargo."

* 2 Rob., p. 164.

Here contraband in an outward voyage was, in spite of the maxim that its offence was deposited with the cargo, allowed to have an *influence* on the character of the *returned* voyage. Still it was but an indirect and partial influence. It was held to be an *aggravation only* of the fraud, the fraud being the gist of the offence.

In 1800, June 24, occurs the case of the Nancy, Knudson master, a ship taken on a voyage to Copenhagen from Batavia, whither she had carried contraband of war. The cargo appears to have been condemned, on the ground of fraud in the papers and destination, *combined with the contraband quality* of the *outward cargo*. The complexion and weight, however, which the last ingredient had assumed in the mind of the judge, are seen in the following extract from the judgment pronounced by him:

"But it is said, this is a past transaction, and that in case of contraband, the returned voyage has *not usually* been deemed connected with the outward. In *European* voyages of no great extent, where the master goes out on one adventure, and receives at his delivering ports, new instructions and further orders, in consequence of advice obtained of the state of the markets, and other contingent circumstances, *that rule* has prevailed; *but* I do not think, in *distant* voyages to the *East Indies*, conducted in the manner this has been, the same rule is fit to be applied. In *such a transaction*, the different parts are not to be considered as *two voyages*, but as *one entire transaction*, formed upon one original plan, conducted by the same persons, and under one set of instructions, *ab ovo usque ad mala.*" * This condemnation of the cargo was confirmed by the lords of appeal, and the indulgence even allowed with respect to the ship, by the high court of admiralty, reversed by that superior tribunal.

The existence of contraband in an outward voyage, not only figures more considerably in this, than in any preceding case; but the judge gets hold of a new implement of judicial

* 3 Rob., 105–6.

warfare on neutral commerce. In aid of presumptive fraud, of the alleged continuity of fraud from the outward into the returned voyage, and of the aggravation given to fraud by the ingredient of contraband in the outward voyage; in aid of all these, the *distance of the voyage*, makes for the first time, its appearance. In the case of the Margaretha Magdalena, the voyage, like this, was a voyage to Batavia. In the case of the Rosalie and Betsey, the voyage was also into the East Indian seas. In neither of these cases, the slightest allusion is made to that criterion of right and wrong. The discovery then may fairly be dated with the case of the Nancy, of no older date than June, 1800.

But mark the reason, why *distant* voyages to the East Indies are distinguished from European voyages of no great extent. It is, because in the latter the master "receives at his delivering ports, new instructions and further orders, in consequence of advice obtained of the state of the markets, and other contingent circumstances;" whereas, in distant voyages to the East Indies, *conducted in the manner this has been*, the two voyages are to be considered as one entire transaction, formed upon one original plan, conducted by the same persons, and under one set of instructions.

If the reason here given for the distinction between distant voyages and voyages of no great extent, be a good one, it is not easy to see the reason for requiring, in addition to the distance of the voyage to the East Indies, that it should be conducted in the manner of this particular voyage; unless indeed it be, as there is too much room to remark in the decisions of the Judge, with a view to rest every case, as much as possible, on its own particular circumstances; and thereby avoid the judicial fetters formed by a chain of definite precedents.

Certain it is, that if the outward and returned voyages are to be taken as one, where the distance of them is such, that new orders cannot be given, in consequence of new advices from the foreign ports of delivery, as may be done in voyages

of no great extent; but that the whole business must be executed under one original set of instructions; every voyage to the East Indies, *in whatever manner conducted*, must fall within the rule which determines the outward and returned voyage to be but one voyage; in other words, that in that extensive branch of neutral commerce, the outward and returned voyage, making but one, contraband in the outward cargo, *though deposited at its place of destination*, is to have the same effect on the returned voyage, as it would have had on the outward voyage, if actually intercepted on the outward voyage.

Nay more; the rule must be applicable to every *European voyage, of great extent*; an extent so great as to require that the sale of the outward cargo at the ports of delivery, and the purchase of a return cargo, should be provided for, in the same original instructions.

In no view can the rule be less applicable to *distant voyages* between Europe and the West Indies, than between Europe and the East Indies; nor more to European voyages than to American voyages to the West Indies, where these are of so great extent as to require that the returned voyage should be provided for in the same set of instructions with the outward voyage.

Whether these analogies and inferences entered into the contemplation of the Judge on this occasion, is an enquiry which may be waived. Nor is it known to the public, whether any intermediate steps were taken by him, or by the superior tribunal, between that date and the 24th June, 1803, conducting the policy or opinion of the cabinet, towards the instructions of this last date. These form, however, a very natural result of those preliminary ideas, as appears by the tenor of the instructions, which is as follows:

"In consideration of the present state of commerce, we are pleased hereby to direct the commanders of our ships of war and privateers, not to seize any neutral vessel which shall be carrying on trade directly between the colonies of enemies and

the neutral country to which the vessel belongs, and laden with the property of inhabitants of such neutral country: Provided, that such neutral vessel shall not be supplying, nor shall have, on the *outward voyage* supplied, the enemy with any articles of *contraband of war*; and shall not be trading with any blockaded port."

In these instructions we find the principle formally adopted, and the returned cargoes of West India produce actually obstructed, on their way to the United States, by the application of the principle, wherever the outward cargo had included contraband. We find, of course, the West India trade so far forced out of the channel to Europe through the United States, into such channels to and through Great Britain, as she may chuse to prescribe.

This being necessarily and obviously the commercial effect of the instructions, it may fairly be supposed that it corresponds with the intentions of a nation so clear-sighted in whatever affects her commerce; and, consequently, that the principle on which this instruction is founded, was assumed as subsidiary to the commercial policy on which was founded the main principle under investigation.

Another observation, with respect to this instruction, forces itself upon us. It was a heavy reproach against the instruction of November 6th, 1793, that it was not promulged until it had for some time been ensnaring, and laying waste, the commerce of neutral nations with the West Indies. The instruction of June 24, 1803, first found its way (probably by chance) to public notice in the United States, from the obscure island of Tortola, in the summer of 1805. It must, then. have been in the pockets of cruisers, ensnaring and destroying the commerce of this country, as far as that degree of innovation could have that effect, for a period of about two years The reproach is heightened, too, by the consideration that the snare, in this case, was successful in proportion to the respect observed towards former instructions, the faith of which was violated by the *ex post facto* operation of that in question.

A reparation of the damage is the least atonement that a just and wise nation can wish to make, for such a trespass on all the maxims of public morality, as well as of national honor.

The second pretension subsidiary to the commercial policy of instructions, clothed with the language of belligerent rights, is that of subjecting to capture, colonial produce, re-exported from a neutral country to countries to which a direct transportation from the colonies by vessels of the re-exporting country, has been disallowed by British regulations. The effect of this pretension evidently is, to check neutral nations, particularly the United States, in the circuitous transportation of West India produce; and in the same proportion, to force the trade into channels terminating in British ports. And the effect is the more particularly in her favor, as the re-exportation of the surplus carried into her ports can be regulated by her own laws, for her own interests; whilst she will not permit the laws of other countries to regulate the re-exportation of the surplus carried into their respective ports.

That this pretension, also, is as new as it is arbitrary, will be best seen by a review of its rise and progress; which will at the same time, as in the other instance, illustrate the inconstancy and inconsistency of the maritime proceedings of Great Britain toward other nations.

Prior to the war of 1756, no trace of any such pretension is discovered; and it is testified by the authority of Lord Mansfield, as already seen, that a principle was, during that war, judicially settled in opposition to it. A neutral vessel, off the neutral island of St. Eustatius, had received on board a part of her cargo from French boats, from a French colony. "This," says his lordship, "is now a *settled point* by *the lords* of appeals, to be the same thing as if they had been *landed* on the Dutch shore, and then put on board afterwards; in *which case* there is no *color* for seizure."

Here the rule was solemnly settled by the highest admiralty tribunal in Great Britain, that the trans-shipment, off a neutral port, of colonial goods from an enemy's vessel, pro-

tected the goods from capture, and that where such goods had been landed and reladen, there was not even a *color for seizure*.

Notwithstanding this solemn recognition of the neutral right, it was found, as also has been seen, that French produce exported by neutrals from the neutral port of Monte Christi, during the war of 1756, was not protected by the rule.

During the war of 1778, the whole claim of disturbing neutral commerce on the ground of its not being open in peace as well as in war, having been relinquished, the question could not occur until the war of 1793. And what is not to pass unnoticed, the first case in which the point fell under judicial observation, appears to have been that of the Immanuel in November, 1799. During the six preceding years, as may be inferred from what then fell from the judge, no doubt had existed, that an importation of colonial produce into a neutral country, converted it into the commercial stock of the country, with all the rights, especially those of exportation, incident to the produce or manufactures of the country itself.

It will be most satisfactory to present the opinion of Sir William Scott on that occasion, in the words of his reporter. "It is argued that the neutral can import the manufactures of France to his own country, and from thence directly to the French colony; why not immediately from France, since the same purpose is effected? It is answered, that it is effected in a manner more consistent with the general rights of neutrals, and less subservient to the special convenience of the enemy. If a Hamburg merchant imports the manufactures of France into his own country (which he will rarely do if he has like manufactures of his own, but which in *all* cases he has an incontrovertible right to do) and exports them afterwards to the French colony, which he does not in their original French character, but as goods which, by *importation* had become part of the national stock of his own neutral country, they come to that colony with all the inconvenience of aggravated delay and expense; so if he imports from the colony to Ham-

burg, and afterwards to France, the commodities of the colony, they come to the mother country under a proportional disadvantage; in short, the rule presses on the supply at both extremities, and, therefore, if any considerations of advantage may influence the judgment of a belligerent country in the enforcement of the right, which upon principle it possesses, to interfere with its enemy's colonial trade, it is in that shape of this trade, that considerations of this nature have their chief and most effective operation." *

Although the judge is somewhat guarded in his terms, *more consistent* with the *general* rights, and *less subservient* to the special convenience of the enemy; and somewhat vague, if not obscure, in his reasoning; yet he admits that an *importation* of goods from a belligerent country, into a neutral country, had the effect of making them a part of the national stock of the neutral country, equally entitled with the national stock itself, to be exported to a belligerent country. What circumstances would constitute an importation are not specified; nor does it appear in what light a mere trans-shipment, at a neutral port, would have been regarded.

The next occasion, on which the judge delivered an opinion on this subject, occurred in a case before the court, February 5, 1800, and which came before it again on farther proof, April 29, 1800. It was the case of an American ship taken October 16, 1799, on a voyage from Marblehead to Bilboa, with a mixed cargo of fish, sugar and cocoa. The fish, which made the principal part of the cargo, could not enter into the question. The sugar was part of a whole cargo brought from the Havanna in the same ship, had been warehoused from some time in June till some time in August, during the repair of the ship, and was then reshipped. The cocoa, small in quantity, was originally from a Spanish settlement, and had been trans-shipped from another vessel, lying at Marblehead, after having been entered at the custom-house. *The ship had been restored by the captors.* The property of the cargo

* 2 Rob., 169, 170.

was proved. The legality of the voyage was the sole question. On this question, Sir William Scott pronounced the following judgment:

"There remains then only the question of law, which has been raised, whether this is not such a trade as will fall under the principle that has been applied to the interposition of neutrals in the colonial trade of the enemy. On which it is said that if an American is not allowed to carry on this trade directly, neither can it [he?] be allowed to do it circuitously. An American has *undoubtedly* a right to import the produce of the Spanish colonies for his own use; and after it is imported bona fide into his own country, he would be at liberty to carry them on to the general commerce of Europe: Very different would such a case be from the Dutch cases, in which there was an original contract from the beginning, and under a special Dutch licence to go from Holland to Surinam, and to return again to Holland with a cargo of colonial produce. It is not my business to say what is universally the test of a bona fide importation. It is argued that it would not be sufficient that the duties should be paid, and that the cargo should be landed. *If these criteria are not to be resorted to, I should be at a loss to know what should be the test;* and I am strongly disposed to hold, that it would be sufficient *that the goods should be landed and the duties paid.* If it appears to have been landed and warehoused for a considerable time, it does, I think, raise a forcible presumption on that side; and it throws it on the other party to shew how this could be merely insidious and colorable. There is, I think, reason to believe that the sugar was a part and parcel of a cargo said to have been brought from a Spanish colony in this vessel; and if so, the very distribution of the remainder is some proof that they were not brought with an intention only of sending them on. But I have besides positive proof in the affidavit of Mr. Asa Hooper, who swears *that the duties had been paid for them.* Then the only difficulty remains as to the cocoa, and it is said by one of the witnesses, and by one only, that it was trans-shipped from another vessel,

and that it had been brought into America only ten days before; but although there is something of a difficulty arising on this small part of the cargo, yet upon the whole I cannot think it weighty enough to induce me to send the case across the Atlantic for still further proof, as to the facts of this recent importation and trans-shipment, or of its having been transferred to the present proprietors, or of having been exported without a previous payment of import duties. If it had composed a larger part of the cargo, I might have deemed it reasonable to have had somewhat more of satisfaction on some of these points, which do not appear with sufficient certainty to found any legal conclusion against it. It appears by the *collector's certificate* that it had been *entered* and *imported*, and I think that these words are *sufficient to answer the fair demands of the court.*"

It must be confessed that we perceive, in this opinion of the judge, somewhat of that customary forecast, which in tying a knot to bind himself, avoids drawing it too close to be loosened a little, if there should be occasion. It is, nevertheless, established by the precedent, that the landing of the goods and paying the duties, is a sufficient test of the importation; and that the certificate of the collector that "they have been entered and imported, is all the evidence of the fact, that can *fairly* be demanded by the court."

It might indeed have been expected that the rule stated by Lord Mansfield to have been *settled by the lords of appeals*, [which makes the trans-shipment to be equivalent to the landing and reshipment of goods, and this last procedure to take away all color for seizure,] would have found its way into the notice of the judge. That rule, however, cannot be impaired by any thing in his decision for two reasons. One is, that the further satisfaction, which, if the part of the cargo transshipped had been more considerable, he might have deemed reasonable on some of the questions; might refer not to the legality of the voyage, but to the question of property; and it is certainly agreeable to all the just rules of interpretation so

to understand it, rather than to suppose a purpose in an inferior court, to decide in direct opposition to a rule settled by the superior court. The other reason is still more conclusive; it is, that on the supposition of such a purpose in an inferior court, it could have no legal effect in controuling the rule *settled* by the superior court, the rule by which alone the conduct of individuals could be governed.

Such has been the *judicial* exposition of the neutral right, even under the British restrictions. The acknowledgment by the *cabinet itself*, was officially disclosed on the following occasion, and to the following effect:

The cruisers of Great Britain having seized, and the vice admiralty courts having condemned, American vessels bound from the United States to the Spanish West Indies, on the pretext that their cargoes consisted of articles the growth of Spain, then at war with Great Britain; the American Minister in London, in March, 1801, represented to the British Government the iniquity of the proceeding, with the indignation which it inspired: and required that precise instructions should be dispatched to the proper officers in the West Indies and Nova Scotia, to put an end to the depredations. The subject was referred to the king's advocate general, an extract from whose report was communicated by the British Secretary of State to the American minister, with information that the king had ordered the doctrine laid down in the report, to be immediately transmitted to the several inferior judges, as the law for their future guidance and direction.

The extract containing this doctrine shall be literally recited:

"I have the honor to report, that the sentence of the vice admiralty court appears to be erroneous, and to be founded in a misapprehension or misapplication of the principles laid down in the decision of the court of admiralty referred to, without attending to the limitations therein contained.

"The general principle respecting the colonial trade has in the course of the present war been to a certain degree relaxed

in consideration of the present state of commerce. It is now *distinctly understood*, and has been repeatedly so decided by the high court of appeals, that the produce of the colonies of the enemy may be imported by a neutral into his own country, and may be re-exported from thence, even to the mother country of such colony; and in like manner the produce and manufactures of the mother country may, in this circuitous mode, legally find their way to the colonies. The direct trade, however, between the mother country and its colonies has not, I apprehend, been recognized as legal, either by his majesty's Government or by his tribunals.

"What is a direct trade, or what amounts to an intermediate importation into the neutral country, may sometimes be a question o some difficulty. A general definition of either applicable to all cases, cannot well be laid down. The question must depend upon the particular circumstances of each case; perhaps the mere touching in the neutral country, to take fresh clearances, may fairly be considered as a fraudulent evasion, and as in effect the direct trade; but the high court of admiralty has expressly decided (and I see no reason to expect that the *court of appeal will vary the rule*) that *landing the goods and paying the duties* in the neutral country, *breaks the continuity of the voyage*, and is such an importation as legalizes the trade; altho' the goods be *re-shipped* in the *same vessel*, and on account of the *same neutral proprietors*, and forwarded for sale to the mother country."*

It is impossible to express the law meant to be here laid down in clearer terms, so far as it determines "that landing the goods and paying the duties" in a neutral country, legalizes the circuitous trade, even between a belligerent country and its own colonies. What inferior circumstances would have the same effect are not specified. It is not decided without a "perhaps" that the mere touching, &c., would be insufficient to legalize the trade. Nor is the legality even of a *direct trade* between the

* See the printed correspondence.

mother country and its colonies, denied in stronger terms than "I *apprehend* it has not been recognized."

Thus stood the admiralty in Great Britain, as announced by British tribunals, and officially communicated by the British Cabinet to the neutral world. So it had continued to stand, as a pledge and safeguard to neutrals, conforming themselves to it, from the dates of those authorities, the last of which is as far back as the spring of the year 1801.

With what astonishment, then, must the neutral world now learn, from the decision of Sir William Scott on the 23d July, 1805, that, according to the rule of law just laid down, after much deliberation, by the lords of appeals, "the circumstances of landing the goods or securing the duties, do not furnish complete evidence of the termination of the voyage;" and that without this complete evidence, derived from the *original intention* of the importing voyage, the voyage from the neutral port will be treated as the continuance of the voyage from the colony to the mother country.

This political change in the judicial rules of condemnation, admits no other satisfactory, than a commercial explanation; for the loss of character, which it induces, is a greater sacrifice than could be made to the cupidity of cruisers, or the value of their prizes to the public.

The whole course, indeed, of modifications pursued by the instructions, and by the decisions of the courts as they appear from day to day, can leave no doubt that the primary object with Great Britain has been to transfer to herself as large a share as possible of the commercial advantages yielded by the colonies of her enemies. An absolute monopoly was embarrassed by the irresistible pretensions of neutral countries; more especially of the United States, whose neighborhood and habits of intercourse, together with other considerations, forbade a perseverance in the original attempt to exclude them. They were accordingly the first of the neutral nations towards which a relaxation was afforded. The relaxation, after considerable delay, was extended, by the instruction of 1798, to

the neutral nations of Europe. That instruction was founded on a compromise between the interest and the prudence of Great Britain. It permitted neutral nations to trade *directly* with the colonies of her enemies; without trading in colonial productions with one another; and permitted all of them to carry those productions *directly* to *Great Britain.* This arrangement was manifestly calculated to limit the importations of each neutral country to the amount of its own consumption; and consequently to turn the immense residue of colonial wealth, through neutral vessels, into her own market; whence it might be dispensed, under her own regulations, to the neutral countries of Europe having no direct commerce with the West Indies, and even to the belligerent nations whose commerce with their respective colonies she has as completely destroyed, as she has their commerce with foreign countries. The arrangement was specious, but proved to be deceptive. It was expected that the expense and delay of a circuitous trade through the United States would prevent importations and re-exportations, interfering with the projected trade directly from the West Indies to herself; and as long as this expectation was in any degree indulged, the right of re-exportation was admitted, though reluctantly, both by the Government and the courts. Experience, however, finally shewed, that the activity, the capital, and the economy employed by the American traders, overpowered the disadvantages incident to the circuit through the ports of the United States; and secured to them the profits of supplying Europe with the colonial productions of her enemies. In proportion as this unforeseen operation disclosed itself, the *commercial* jealousy of Great Britain began to take alarm. Obstructions were to be thrown in the way of importations. Re-exportations were seen with growing discontent. The idea of continuity, by which two voyages were consolidated into one, came into vogue. The Vice Admiralty courts, regardless of the superior decisions in England, would not allow that the landing of a cargo, and paying the duties, protected it against condemnation. At

length appeared *the sentence of Sir Wm. Scott*, above cited, carrying into effect the construction of the inferior courts, as having been deliberately sanctioned by the Lords of Appeal. The doctrine established by that decision has been followed by other decisions and dicta, at first requiring the re-exportation, in another ship, then a previous sale of the articles in the neutral market, then other conditions, one after another, as they were found necessary; till it is finally understood, that no precautions whatever are to bar the cruisers from suspecting, nor the courts from scrutinizing, the *intention* of the original importer, and that the proof of this intention not to re-export the articles, is to fall on the claimant. To fill up the measure of judicial despotism, these wanton innovations are now extended to vessels returning from the belligerent mother countries, as well as to those going thither from the United States; with the addition of demands of proof never before heard of in prize courts, on points utterly unknown to the law of nations.

These unexampled and vexatious proceedings manifestly have in view *the entire obstruction* of colonial re-exports from the United States; and it would be more candid in Great Britain, if not more just, to give public notice, at once, that in all such cases capture and condemnation would be authorized.

Her present system, as subsidiary to the extension of her commerce, will be still further seen in her concurrent measures, of a type not less extraordinary than that of any which have preceded them.

According to the instructions issued within the period of the existing war, or to the received interpretation of them, the permission given to neutrals by those of 1798, to carry the produce of enemy's colonies, directly therefrom to Great Britain, has not been continued. At first view this might appear to be inconsistent with the policy ascribed to her, in obstructing re-exportations from the United States. The act of Parliament, of June 27, 1805, however, which has been already noticed,

changes this appearance of departure from that policy, into a new proof, and even an extension of that policy. By the regulations of that act a direct trade is opened between the British colonies in the West Indies and those of her enemies; and her enemies themselves are invited to enter into the trade. Whilst neutrals, therefore, are excluded from carrying colonial produce directly from the colonies to Great Britain, the commercial views of Great Britain are answered by the substitution of another channel through her own colonies; with the additional advantage of a *monopoly to her own ships*, in the transportation from her colonies across the Atlantic; and for the sake of this advantage, or for that of repressing the growth of neutral rivalship, or on both these accounts, she has been willing to encounter all the reproach of cultivating an avowed commerce with her enemies, in the very moment of laying new restrictions on that of neutrals with them.

Further; the act of Parliament, of June 27, 1805, providing for a trade between Great Britain and the colonies of her enemies, through the medium of free ports in her own colonies, was preceded by an act of April 10, 1805, authorizing licences to *British subjects*, to import, *during the war*, into Great Britain, in *neutral vessels*, for their *own* or neutral account, from the American colonies of her enemies, most of their productions; requiring, at the same time, that all sugar and coffee so imported should be *re-exported;* and that *the value of* a certain portion of the imports from such colonies should be returned *in goods and commodities from Great Britain.*

Again; in concert with the act of June 27, instructions, founded on another act of Parliament, were issued, June 29, 1805, authorizing British subjects to export in neutral vessels to France, Spain, and Holland, a long list of articles, including their respective colonial productions; and to import therefrom a long list of such articles as suited her own wants.

To complete the arrangement, in all its forms, it has been officially announced in the American Gazettes, conformably to a resolution of the British privy council, of August 3, 1805,

that the trade with the settlements and islands belonging to the enemy, in America and the West Indies, is to be carried on through the medium of the British free ports in the West Indies, and *not otherwise.*

The system of Great Britain may, therefore, now be considered as announced to all the world, without disguise, and by the most solemn acts of her government. Her navy having destroyed the trade of her enemies, as well between the mother countries and their colonies, as between the former and neutral countries; and her courts, by putting an end to re-exportations from neutral countries, reducing the importations into these, to the mere amount of their own consumption; the immense surplus of productions accumulating in the American possessions of her enemies can find no outlet but through the free ports provided for it; nor any other market than the British market, and those to which she finds it for her interest to distribute it; with a view to which, she not only allows her enemies to trade with her possessions, but allows her own subjects to trade with her enemies. And thus, in defiance as well of her treason laws and of her trade laws, as of the rights of neutrality, under the law of nations, we find her, in the just and emphatic language of the President, "taking to herself, by an inconsistency at which reason revolts, a commerce with her own enemy, which she denies to a neutral, on the ground of its aiding that enemy in the war." *

But let us return for a moment to the series of instructions of which an historical review has been taken; and advert to some additional lights in which the judicial construction and application of them present the conduct of Great Britain.

Prior to the order of November 6, 1793, the general principle forbidding to neutrals a trade opened to them during the war, must, if it be a principle of the law of nations, as asserted by Great Britain, have been the rule of Admiralty decisions. Accordingly, it appears, by 4 Rob. Appendix, p. 12, that con-

* President's message, December 3, 1805.

demnations in cases prior to that date were, in the court of Appeals, made to rest on that principle.

The orders of November 6, 1793, designated for the operation of the principle, the trade with the colonies of the enemy; as well the trade to, as the trade from, them.

The orders of January, 1794, expressly revoking the orders of November, 1793, designated for the capture, the trade only *from the West India Islands* of the enemy, and bound directly to Europe, only.

The orders of January, 1798, revoking expressly the orders of January, 1794, designated for capture the trade from the islands or settlements of the enemies, bound directly to any port in Europe; excepting what might be bound to British ports, or to the ports of the country to which the neutral vessels should belong.

Without entering into a variety of minute questions growing out of the varied and very inaccurate expressions in which the orders are penned, several of very great importance occur, in expounding and applying the rules laid down.

The first question is, whether the first order of 1793, which made no express reference to the general principle, and which was limited to the colonial branch of the enemy's trade, was to be understood as merely a specification of certain cases, to which the general principle was applicable, leaving the general principle in force as to all unspecified cases; or whether this specification of certain cases was to be understood as implying a legalization of cases unspecified.

The question arises, also, under the successive orders, each of them revoking the orders immediately preceding, whether it was to be understood, that the specification of certain cases did, or did not, legalize the cases omitted in the same order, but specified in the orders preceding.

The more obvious construction of the original order, even, seems to be, rather that it was meant to define the *only* cases to which the general belligerent claim was to be applied, than that it was meant merely to notify the claim in those particular

cases; a claim not more requiring notification in those cases, than in the cases not notified.

With respect to the orders of posterior dates, the fair construction implies, that the belligerent claim was narrowed, first, by all the difference between the orders of 1793 and those of 1794; and finally, by all the difference between the orders of 1794, and those of 1798.

Taking the whole together under these constructions, the application of the general principle of capture was restricted by these orders to the trade of neutrals *from* the colonies of enemies, *directly* to ports, other than their own *respective ports* and the *British ports*, and consequently there remained exempt from capture:

1st. The coasting trade, and every branch of trade not colonial.

2d. The trade *from any* neutral country, *to* belligerent colonies.

3d. The trade by neutrals *from* any belligerent country *to* its own colonies, and to the colonies of another belligerent country.

4th. The trade between belligerent colonies, whether belonging to the same or to different belligerent countries.

Applying this rule of implication to the two orders only of 1794 and 1798; and admitting those of 1793 not to have superseded by implication, the claims to capture in cases not therein specified, there will be no other exception to the relations or exemptions just enumerated in favor of neutral commerce, but the coasting trade, and other trades not colonial, to which Great Britain has applied, or may choose to apply, the general principle.

In general the high court of admiralty seems, by applying the assumed principle to the coasting trade, to have pursued that construction of the original order of 1793, which left the general principle in force as to cases not specified in it; and to have considered the relaxations in the succeeding orders of 1794 and 1798, as referring solely to the colonial trade.

There appears, however, at no time to have been any clear and fixed opinion in the court, with respect to the illegality and penal consequences of the coasting trade.

Few cases are reported, perhaps few have occurred, of discussions relative to this branch of trade. In 1 Rob., p. 104, the subject is incidentally brought into view, in a case where a French vessel had been purchased. The doctrine held by the judge is expressed as follows: "We certainly do allow it, "[the purchase,] but only to persons conducting themselves "in a fair neutral manner, &c.; besides, this vessel appears "to have been engaged in the coasting trade of France. The "court has never gone so far as to say, that pursuing one "voyage of that kind would be sufficient to fix a hostile char- "acter: but in my opinion, a habit of such trading would. "Such a voyage however must raise a strong degree of sus- "picion against a neutral claim; and the plunging at once into "*a trade so highly dangerous*, creates a presumption that there "is an enemy proprietor lurking behind the cover of a neutral "name." Here, not the coasting trade itself, but the presumption of enemy's property found in it, is made the ground of animadversion.

In the case of the Speculation, the same idea presents itself.*

The Emanuel† was itself the case of a coasting trade. In this case the judge descanted with great energy and rigor, on the manifest illegality of the coasting trade. "Can there be "described," says he, "a more effective accommodation that "can be given to an enemy during war than to undertake it "for him during his own inability?" He did not however proceed further than to refuse freight on the principle settled by ancient judgments, *that "neutrals are not permitted to trade on freight."* He particularly refers to the case of the Mercurius, [Lords, March 7, 1795,] in which freight was refused. Why were not the ships confiscated in these cases? that being laid down in other cases as included in the penalty for illegal voyages, and actually applied ultimately to cases of a trade be-

* 2 Rob., p. 244. † 1 Rob., 249.

tween a colony and the mother country, to which the coasting trade is strictly analogous; both being trades from one port to another port of the same nation. It is not even to be inferred from the authorities here cited, that a coasting trade, in the produce of the country, if carried not on freight, but as property belonging to the neutral owner of the ship, is subject to any penalty. This indulgence to the coasting, and rigor towards the colonial trade, is it to be explained by the fertility of the one, and the little value of the other, as a source of captures and commercial profit, or in what other way?

With respect to the orders of '94 and '98, and the colonial trade, it appears to have been in general understood, that they were to be construed as successively enlarging the trade of neutrals with the colonies of enemies, in the manner and to the extent above explained.

The dilemma was indeed unavoidable; either the orders were to be considered as relaxations, (and if relaxations at all, in that extent,) or as leaving the general principle in force in cases not specified in the orders, and therefore as no relaxations at all.

This latter decision would have given a character of mockery to the profession and parade of making, in their orders, so many sacrifices of belligerent rights to a spirit of moderation and amity towards neutrals. The former side of the dilemma, therefore, was necessarily taken. The orders, those of '94 and '98 at least, were relaxations.

As relaxations however in the extent required by an obvious and consistent interpretation, the door, opened to neutral commerce with the belligerent colonies, was found to be wider than was compatible either with the interests of British commerce, and the avidity of British cruizers, or the probable intentions of the British government.

What was to be the remedy? The first tried was that of shutting the door gradually, by the dint of constructions, as may be seen by tracing the colonial cases adjudged by Sir William Scott, and reported by Robinson, and the decisions of the Lords of Appeals referred to by the reporter.

The task was assuredly not a little difficult, of which there is the strongest demonstration in the crooked and contradictory reasonings and decrees, into which it forced the very eminent talents of the judge who presides in the high court of admiralty.

In addition to the evidence already presented, take the following comparison between his rule of construction in the case of the Providentia,* and the rule of construction in the case of the Immanuel.†

In the former case, August 16, 1799, he observes, "the first "instructions were to bring in all ships which had been trading "with any colony of the enemy: but this country afterwards "receded from these directions; and the second orders were to "bring in all ships laden with produce of the West India "islands *coming directly* from the ports of the said islands *to* "any port in Europe. I cannot but consider this as an aban- "donment of the former law, [instruction,] and I cannot but "think that a cruiser taking this instruction, in *conjunction* "*with those* given before *must have inferred* that it was no longer "the intention of government to bring in, and much less to con- "fiscate," [was there room for this distinction?] "cargoes of "West India produce, *unless coming to some port* in Europe: "this was followed by instructions now in force, which direct "the bringing in of all vessels laden with the produce of the "French and Spanish settlements, coming *from* the ports of "such settlements to any port of Europe, other than the ports "of that country to which the vessel belongs. It is certainly "not laid down in the negative that they shall not bring in such "vessels as are coming from such settlements to their own "ports; but *looking at the former instruction*, I think it was a "strong admonition to cruisers not to bring in such ships, "and I believe it has been generally so understood and acted "upon by them; and in this court cargoes brought *from* Suri- "nam *to* ports in Europe to which the vessels belonged, "have been uniformly restored on proof of the neutrality "of the property."

* 2 Rob., p. 126. † 2 Rob., p. 159.

The reasoning here is plain and just. The first instructions designated for capture the colonial trade, without distinguishing between Europe and America: the second designated the trade to Europe only: therefore, by fair inference, the trade to America was exempted from capture.

Again, the second orders designated for capture the trade to Europe: the third orders designated the trade to ports of Europe *not being of Great Britain or of the country owning the vessel:* therefore by fair inference the trade to Great Britain and to countries owning the vessels, was exempted from capture.

In the Immanuel, November 7, 1799, the case was that of a neutral ship taken on a voyage last *from* France *to* a French colony. According to the reasoning of Sir William Scott, just quoted, the inevitable inference ought to have been that the voyage was legal.

The first instructions designated for capture the trade *to* and *from* the colonies. Both the second and third designated for capture the trade only *from* the colonies; therefore, according to that reasoning, the trade *to* the colonies was *exempted from capture*.

Hear nevertheless the reasoning employed by the judge himself in this case.

After combating the neutral right to trade with the colonies of an enemy, by arguments applicable, *in principle*, as well to a trade between neutral ports and the colonies, as to a trade between the mother country and its colonies; he proceeds to state, in answer to all pleas for a neutral trade from the mother country to its colonies, "that the true rule to this court is the text "of the instructions; what is not found therein permitted, is "understood to be prohibited, upon this plain principle, that "the colony trade is generally prohibited, and that whatever "is not specially relaxed, continues in a state of interdiction."

Now as what is *not permitted*, not *specially relaxed*, is by the instruction to continue prohibited, the question to be decided is, what it is that is permitted, or specially relaxed by the in-

structions. Is it what is positively and expressly permitted or relaxed? Then there is no permission or relaxation at all; for every thing positive and express in the instruction is for the capture, not for the permission or relaxation. Is it to be a permission or relaxation implied and inferred from a positive and specified prohibition in one order, and an omission of that or of a part of that prohibition, in a succeeding order? Then the neutral trade from a belligerent country *to* its colonies, which was prohibited in the order of 1793, and omitted in the orders of 1794 and 1798, was as much permitted, as specially relaxed, as the trade from a neutral country *to* the colonies of an enemy, is permitted or relaxed by the omission in the orders of 1794 and '98, to prohibit the trade *to* the colonies, which as well as the trade *from* the colonies, was positively and specially prohibited by the previous order of 1793; or to recur to the reasoning of Sir William Scott, in the former case of the Providentia, as much permitted or relaxed as the trade from the colonies going *not to Europe*, was inferred to be so from the *order* of 1794, *taken in conjunction* with the order of 1793; the order of '93 having prohibited the trade from the colonies generally, and the order of '94 having omitted to prohibit more of the trade from the colonies than what was bound to some port in Europe.

The judge concludes with declaring, "I see no favorable distinction between an outward and return voyage. I consider the intent of the instruction to apply equally to both communications, though the return voyage is the only one specially mentioned."

What favorable distinction, then, could the judge see between the outward and the return voyage, in a trade between a *neutral* country, and the colonies of an enemy, more than between the two voyages to Spain, a mother country, and the colonies? Is not the *return* voyage the only one *specially* mentioned, whether the instruction be applied to the former trade or to the latter trade? This is self evident. Either then he must admit the distinction in both, and say that the

return voyage only being specially mentioned, the outward voyage is in both trades permitted; or he must reject the distinction in both, and say, that the outward voyage, tho' the return voyage only be specially mentioned, is prohibited in both. A different course however was pursued. The instruction was applied to the outward voyage in the neutral trade from the mother country to the colony, without being considered as applicable to the outward voyage in the trade from the neutral country to a colony; which last has not as yet been subjected to condemnation. Whether that is to be its future destiny, as has happened to some other branches of commerce, where it was equally precluded by legal decisions and even *official assurances*, is among the arcana of the admiralty cabinet of Great Britain.

The judgment in this case, it is to be observed, did not go beyond the condemnation of the goods. The vessel was restored, but with a forfeiture of freight and expences.

By degrees, however, with the aid of alleged fraud, of false destination, and of contraband in the outward voyages, the ship as well as the cargo were brought within the rules of condemnation in the high court of admiralty. The decision of the lords of appeal has finally established, in the case of a voyage from a Spanish colony to a neutral, but forbidden port in Europe, that any illegal trade of neutrals with the colonies of an enemy forfeits both ship and cargo.*

Other examples might be drawn from the proceedings in the British courts of admiralty, to illustrate the constructive return towards the general principle which had been mitigated by successive instructions, and the anomalous and entangled decisions, which have been employed for the purpose. These illustrations cannot be here pursued, without too great an addition to the prolixity which has already been incurred. It will only therefore be remarked generally; first, that the course of proceedings, as they relate to the coasting, and different branches of the colonial trade; to the grounds on which

* 4 Rob. Appen., p. 11.

these have been interdicted to neutrals; and to the penalties attached to breaches of the interdictions, compose a labyrinth for which no concatenation of principles, no thread of reasoning whatever, affords a clue: secondly, that constructive decisions, as appears in the last volume of Robinson's reports, have not only restored, in a great measure, the operation of the general principle; but have introduced collateral principles, greatly extending the mischiefs of its operation.

Whilst all the considerations therefore which originally led to the examination of this principle, are acquiring additional force, it is fortunate that so irresistible a testimony against its legitimacy, should have been furnished by the conduct of Great Britain herself.

Review of the reasons urged in defence of the British principle.

Although some of the reasons by which this belligerent claim of Great Britain is defended, have incidentally fallen under consideration in the course which the subject has taken, yet a more particular notice of those most relied on, may be necessary to complete the present examination.

The principal champions for the claim, are the judge of the high court of admiralty himself, Sir William Scott; Mr. Ward, now under Secretary of State in Great Britain, who is sufficiently known by his treatises on the law of nations, one of which embraces this precise subject; and Mr. Browne, a professor of civil law in the University of Dublin, and author of a work on civil and admiralty law.

Sir William Scott has, in every view, the first title to be heard.

In the judgment delivered by him in the case of the Immanuel, his eloquence has painted the belligerent claim in very glowing colours. The passage shall be given in his own words:

"It is an indubitable right of the belligerent to possess himself of such places, as of any other possession of his enemy. This is his common right, but he has the certain means of carrying such a right into effect, if he has a decided superiority

at sea: such colonies are dependent for their existence, as colonies, on foreign supplies; if they cannot be supplied and defended they must fall to the belligerent of course—and if the belligerent chooses to apply his means to such an object, what right has a third party, perfectly neutral, to step in and prevent the execution? No existing interest of his is affected by it; he can have no right to apply to his own use the beneficial consequences of the mere act of the belligerent, and say, 'True it is, you have, by force of arms, forced such places out of the exclusive possession of the enemy, but I will share the benefit of the conquest, and by sharing its benefits prevent its progress. You have in effect, and by lawful means, turned the enemy out of the possession which he had exclusively maintained against the whole world, and with whom we had never presumed to interfere, but we will interpose to prevent his absolute surrender, by the means of that very opening, which the prevalence of your arms alone has effected; supplies shall be sent and their products shall be exported; you have lawfully destroyed his monopoly, but you shall not be permitted to possess it yourself; we insist to share the fruits of your victories, and your blood and treasure have been expended, not for your own interests, but for the common benefit of others.' Upon these grounds it cannot be contended to be a right of neutrals, to intrude into a commerce which had been uniformly shut against them, and which is now forced open merely by the pressure of war; for when the enemy, under an entire inability to supply his colonies and to export their products, affects to open them to neutrals, it is not his will but his necessity that changes his system; that change is the direct and unavoidable consequence of the compulsion of war, it is a measure not of *French* councils, but of *British* force."

The first remark to be made is, that were the intrinsic reasonableness of the claim admitted, it would not follow that the claim is justified by the law of nations as actually established. Reason is indeed the main source from which the law

of nations is deduced; and in questions of a doubtful nature, is the only rule by which the decision ought to be made. But the law of nations, as an established code, as an actual rule of conduct among nations, includes, as already explained, a variety of usages and regulations, founded in consent, either tacit or express, and superadding to the precepts of reason, rules of conduct of a kind altogether positive and mutable. If reason and conveniency alone, without regard to usage and authority, were to decide all questions of public law, not a few of the received doctrines would at once be superseded; and among the first, some to which Great Britain is most pertinaciously attached. What would become of her favorite claim, to seize and condemn all enemy's property, laden in neutral vessels, if the claim were brought to the simple test of reason? a claim which gives so much more vexation to the nations at peace, than it contributes to any just advantage of those at war. On this question, it is well known, that the appeal has been constantly made by Great Britain from the reasoning of her adversaries, to the authority of celebrated jurists, and other testimonies of the established rules and practice of nations. She must not expect to vary her test of right, according to her individual interest: to appeal to authority when reason is against her, and to reason, when authority is against her.

In testing the British claim, then, by the law of nations, recurrence must be had to other sources than the abstract dictates of reason; to those very sources from which it has been shewn that her claim is an unauthorized innovation on the law of nations.

But let us examine this appeal of the eloquent Judge to the reasonableness of his cause, and see what is gained by it.

"It is an indubitable right of the belligerent to *possess* himself of such places, viz: colonies, [but the argument extends *to all places* shut against neutral commerce in time of peace,] as of any other possession of his enemy." Without question he

has the right to possess himself of any place belonging to his enemy.

"But he has the certain means of carrying such a right into effect if he has a decided superiority at sea." This is not so universally true as is assumed. A land force will be also necessary; unless both the superiority at sea and the situation of the colony be such as to admit a complete interruption of supplies; and then, a blockade must be the only legitimate expedient.

"Such colonies are dependent for their existence as colonies, on foreign supplies: if they cannot be supplied and defended they must fall to the belligerent of course." It is certainly true that they must fall, if they can be neither fed nor defended. But it is not so true that colonies, *as such*, are dependent on foreign supplies. Some insular colonies are so dependent; others are not. Few, if any, of the *continental* colonies or settlements are dependent on foreign supplies.

"And if the belligerent chooses to apply his means to such an object, what right has a third party perfectly neutral to step in, and prevent the execution?" No right at all to step in; provided the belligerent does, in fact, apply his means to that object, and, in the mode, conformable to the law of nations; that is, by intercepting contraband of war, and availing himself of his decided superiority at sea, to blockade the places, which if deprived of foreign supplies, must fall into his hands of course.

Take the argument under another aspect. Colonies must fall without foreign supplies; therefore, it is said, a belligerent, without invading or investing them, may prevent neutrals from supplying them.

The argument has one tendency which ought not to have escaped the penetration of its author. If the dependence of a place for its existence and defence on foreign supplies, be the ground of the belligerent right to intercept all neutral trade whatever with it, it will not be very easy to find a reasonable ground for the belligerent right to obstruct neutral supplies to

a place blockaded, where the place, as frequently occurs, does not depend on foreign supplies for its existence and defence.

Or the argument may take another turn, which ought not to escape the attention of neutrals. If the applicability, without an actual application of the means, to the legitimate object of possessing himself of the colonies of enemies, can justify the capture of netural trade with such places, the mere existence of a force applicable to the purpose of a blockade any where, will, without an actual blockade, equally authorize the capture of a neutral trade with ports susceptible of blockade; and thus the neutral trade becomes interdicted with every part of the dominions of her enemy; on the same principle as interdicts it with the colonial part of their dominions; a blockade being as legitimate an object of war as conquest; and a decided superiority at sea being at least as applicable to the former, as to the latter object.

But an essential vice of the argument lies in the fallacy of the inference. It no more follows from the dependence of colonies on foreign supplies, that neutrals have no right to trade with them, with the exceptions of contraband and of blockaded ports, than it follows from the dependence of other countries or parts of countries on foreign supplies, that neutrals have no such right. Is not Holland, is not Portugal, is not even Spain, at all times, dependent on foreign supplies for their subsistence; not less perhaps than some of the insular colonies in the West, and much more than some in the East Indies? Yet since the usurped power of obstructing *all* neutral trade with an enemy was abandoned by belligerent nations has it ever been pretended that that dependence gave a right to the enemies of those countries to prevent neutral supplies to them?

The argument fails when brought to another test, If the dependence on foreign necessaries constitutes the belligerent claim against the neutral trade to colonies, the principle of the claim limits it to such colonies as labour under this depen-

dence. The continental colonies or settlements, which have within themselves resources, necessary for their existence, and which therefore no decided superiority at sea can reduce into the possession of a belligerent, are clearly not within the utmost range of the principle. Yet no distinction is made in the application of it, either in argument or practice, between the most sterile and indefensible island, and the vast and fertile provinces on the continent of South America.

Thus far, then, the judge has found no foothold for the belligerent pretension which he endeavors to support.

But he must be heard further: "No existing interest of his [the neutral] is affected by it," [an exclusion, &c.]

The interests of neutrals may be materially affected by the loss of the customary supplies from belligerent colonies, as must happen, if they can neither trade directly with the colonies, nor receive supplies from them thro' the mother country. This is the consideration expressly assigned, in the appendix to 4 Rob., for the orders of 1798: "Neutral vessels were by this relaxation allowed to carry on a direct commerce between the colony of an enemy and their own country; a concession rendered more reasonable by the events of war, which by annihilating the trade of France, Spain, and Holland, had *entirely deprived* the States of Europe, of the *opportunity of supplying themselves* with the articles of colonial produce, in those markets." This is a view of the subject very different from that given by Sir William Scott here, and in another paragraph; where he represents "Guadaloupe and Jamaica, as no more to Germany, than if they were settlements in the mountains of the moon, to commercial purposes, as not in the same planet."

The judge proceeds, "He [the neutral] can have no right to apply to his own use, the beneficial consequences of the mere act of the belligerent."

Why not? In many respects, as will hereafter be seen, the neutral suffers by war; is it unreasonable that in some respects, he should profit by its effects?

Waiving this consideration, it does not follow that one belligerent has a right to deprive a neutral of a *colonial* market opened to him under the pressure of war, by another belligerent, any more than of any new market or new channel of trade, in relation *to the mother country*, opened under a like pressure. As yet, however, the latter pretension has not appeared.* It is even disavowed in a succeeding passage of this very judgment. Is it not the pressure of war, which at this time, obliges the enemies of Great Britain, to abandon in great measure, to neutral vessels, the trade between themselves and other countries? Is it not the pressure of war, during which more food is consumed, with fewer hands to raise it, that often compels nations at war, to open their ports to the supplies and ships of neutrals, contrary to their ordinary regulations in time of peace? In a word, the whole commercial policy of belligerent towards neutral nations, undergoes changes, which the latter is in the constant practice of "applying to their own use." And it is manifest that Great Britain is as ready, as any of her enemies, to lay open her navigation and her colonial markets, though so rigorously shut in time of peace, whenever the pressure of war, makes it her interest, that neutrals should apply the benefit of these changes to their own use.

It is perfectly clear, then, that the mere circumstance of an increase of profit to neutrals, from a participation in branches of trade opened under the pressure of war, does not render that participation unlawful.

The sequel of the argument assumes a very singular shape. The neutral has no right to say to the belligerent,—"True it is you have by force of arms forced such places out of the exclusive possession of the enemy, but I will share the benefit of the

* The pretension has not appeared in the courts in England. But in a late case in the vice admiralty court at Halifax, it appears that the judge was disposed to consider the introduction of certain regulations at Bourdeaux, favorable to neutral commerce, as forming an *unusual* trade, and, in that view, as a legal ground of capture.

conquest; and by sharing its benefits, prevent its progress. You have, in effect, and by lawful means, turned the enemy out of the possession which he had exclusively maintained against the whole world, and with whom we had never presumed to interfere; but we will interpose to prevent his absolute surrender, by the means of that very opening which the prevalence of your arms alone has effected."

Here let it be observed, the case first stated is, that the *place* has been forced by one belligerent out of the possession of another belligerent, and that the neutral is undertaking to share the benefit of the *conquest*. Were that the real intention, as it is the inevitable import of the statement, there could be no advocate for a neutral pretension to interfere. But with an inaccuracy (a harder term will not be applied) little to have been looked for where it is found, this conquest, this turning of the enemy out of exclusive possession, does not in the least mean, as is quickly disclosed, a transfer of the *place* or *colony* to a new sovereign. The colony remains precisely as it did; not even attacked or threatened by a military operation. The conquest really meant turns out to be nothing more than the creation of a certain degree of difficulty and danger in the trade between the colony and the mother country. With this change in the statement of the fact, the inference with respect to the intrusion of a neutral commerce must, unfortunately for the argument, undergo a correspondent change. As the conquest of the colony would have justified the conqueror stepping into the exclusive possession, out of which his arms had forced his enemy, in prohibiting a neutral interference with its trade, it is equally certain, that he is not justified in any such prohibition by the mere obstruction thrown in the way of the ordinary colonial trade; any more than he would be justified by obstructions thrown equally in the way of other branches of his enemy's trade, in prohibiting the entrance of neutrals into them.

That the meaning of the judge is shifted from an expulsion of the enemy from his colony, to an obstruction of his trade

with his colony, is put beyond all question by the conclusion of this hypothetical address of the neutral to the belligerent,—"Supplies shall be sent, and their products shall be exported; you have lawfully destroyed *his monopoly*, but you shall not be permitted to *possess it yourself*."

Thus the right of a belligerent to possess himself of the colonies of his enemies depending on foreign supplies, which, in the beginning of the argument, was the ground of the unlawfulness of such neutral supplies, as might prevent the colonies from falling into the hands of the belligerent, undergoes a complete transformation in its progress, and ends in a right of the belligerent to supply the colonies himself, in exclusion of neutrals. The neutral is interdicted from sending supplies to an enemy's colony, and exporting its produce; not because it would interfere with the reduction of an enemy's possession; but because it would interfere with a commercial monopoly. This at least would be a new principle in the law of nations.

But it is worth while to enquire how the right of a belligerent to subdue the colonies of his enemy, and for that purpose to obstruct neutral supplies to them, can be reconciled with the actual regulations of the British Government on this subject. Whilst this claim is exercised, in general, so much to the disadvantage and dissatisfaction of neutrals, it is relaxed in some respects which are fatal to the very purpose of the belligerent to *subdue* the colonies of his enemy; which purpose alone could give a colour to any such obstruction of neutral commerce. The orders both of 1794 and of 1798 limit their restrictions on neutrals to the trade *from* colonies; leaving by implication, unrestricted, the trade *to* the colonies; or they manifest, at least, under every construction, a solicitude rather against the trade *from*, than against the trade *to* the colonies. Now if the object and the pretext, in controuling the trade with the colonies, be the conquest of the colonies, is it not extraordinary that whilst checks are opposed to the exports, which can, at the most, have but a remote influence in preserving them from the necessity of surrender, the channel should be

left open for the importation of those foreign supplies, for the want of which, they might fall to the belligerent of course? How is this to be explained? Not, certainly, by a *belligerent* policy, which is completely defeated by the relaxation. There is but one explanation that is satisfactory, and it must not be deemed uncandid to resort to it. As the orders have endeavored to give to the trade from the colonies such a course as was most favorable to imports into Great Britain, the course allowed to the conveyance of supplies to the colonies is equally favorable to the export of *manufactures*, from Great Britain. British manufactures, it must have been supposed, could find their way to hostile colonies, through no channel so conveniently and certainly, as through that of neutrals which conveys the means of subsistence. Whilst the regulation, therefore, defeats the measure of conquest, it extends the market for manufactures. Every fold of this belligerent claim wraps up some commercial project.

In prosecuting his argument, the judge occupies another ground for this belligerent pretension: "Different degrees of relaxation," he observes, "have been expressed in different instructions issued at various times during the war. It is admitted that no such relaxation has gone the length of authorizing a direct commerce of neutrals, between the mother country and its colonies; *because* such a commerce could not be admitted without a *total surrender* of the principle: for allow such a commerce to neutrals, and the *mother country* of the enemy recovers, with some increase of expence, the direct *market of the colonies*, and the *direct influx* of their productions; it enjoys as before, the *duties of import and export*, the same facilities of sale and supply, and the mass of *public inconvenience* is very slightly diminished."

It was lately the object of dispossessing the enemy of his colonies altogether, that authorized the obstruction of neutral supplies. It was next the object of securing to the belligerent himself, the monopoly of the commerce with those colonies, that gave him such an authority. Now the authority is de-

rived from the policy of withholding from the mother country of the colony, the public conveniencies arising from the revenue and from the commercial profits supplied by her direct intercourse with her colonies.

It cannot be necessary to dwell on the hollowness of this foundation, for the claim to make war on the participation of neutrals in a colonial trade. It will be merely observed, or rather repeated, that if neutrals have no right to trade with an enemy, where the enemy in consequence of the pressure of the war, would otherwise lose the revenues and other public advantages flowing from the trade, the inference fairly is, that Great Britain, by driving the ships of her enemies, as she does at this moment, altogether from the sea, may renew with effect the old and exploded tyranny of interdicitng *all neutral commerce* whatever with her enemies.

This last argument only against the neutral trade to colonies, was applicable to the coasting trade. There, neither conquest, nor the substitution of the belligerent's own commerce, could be the object. It will accordingly be seen in the case of the Immanuel,* that the belligerent claim is founded, as it is here, on its general effect in cramping the revenues of the enemy, and in inflicting a pressure which may compel a due sense and observance of justice.

It only remains to advert to a reply, from the judge to the counsel at the bar, with which he closes the argumentative part of his judgment.

The inconsistency of Great Britain, in making, in time of war, the same relaxations in her navigation and colonial monopolies, which she denies the right of her enemies to make, is so obvious that it could not possibly escape the notice of the counsel for neutral claimants. The more striking the inconsistency, however, the greater the delicacy which was to be observed in pressing it on the court. It appears accordingly to have been brought into view, in one instance only, in Robinson's Admiralty Reports, which was in this case of the

*2 Rob., p. 249.

Immanuel; and here it is managed with much tenderness, and seasoned, finally, with some material concessions to the known opinions of the Bench and the government. In order to do justice to Mr. Arnold and Mr. Sewell, charged on that occasion with the defence of the neutral claimants, and for the sake of some very judicious reflections of a more general nature, with which they introduce their particular argument, no abridgment will be made of the following passage:

"It is true that the general colonial law of Europe has cre-
"ated a monopoly, from which other countries are generally
"precluded; at the same time laws respecting colonies, and laws
"respecting trade in general, have always undergone some
"change and relaxation after the breaking out of hostilities; it
"is necessary that it should be so, with regard to the rights of
"neutral nations; because as war cannot be carried on between
"the principal powers of Europe, in such a manner as to con-
"fine the effects of it to themselves alone, it follows that there
"must be some changes and variation in the trade of Europe,
"and it cannot be said that neutrals many not take the benefit
"of any advantages that may offer from these changes—be-
"cause if so, it would lead to a total destruction of neutral
"trade; if they were to suffer the obstructions in their old
"trade, which war always brings with it, and were not per-
"mitted to engage in new channels, it would amount to a
"total extinction of neutral commerce: such a position, there-
"fore, cannot be maintained, that they may not avail them-
"selves of what is beneficial in these changes, in lieu of what
"they must necessarily suffer, in other parts of their trade, in
"time of war. It is not meant that they should be entirely
"set at liberty from all the restrictions of peace—that would
"be going too far. But that, as there has been a regular
"course of relaxations, as well in our navigation laws, *as in*
"*the colonial trade*, in admitting importations and exporta-
"tions not allowed in time of peace; it seems not to be too
"much to say, that if they have been regularly relaxed in
"former wars, neutral merchants may think themselves at

"liberty to engage in it, in any ensuing war, with impunity; "and *it does justify a presumption, that as a belligerent country "allows a change in its own system as necessary, and invites "neutrals to trade in its colonies under relaxations*, so it would "allow them *to trade in the same manner, with the colonies of "the enemy.*"

In reply:—

"It is an argument," says the judge, "rather of a more legal nature than any derived from those general topics of commercial policy, that variations are made in the commercial systems of every country *in wars and on account of wars*, by means of which neutrals are admitted and invited into different kinds of trade, from which they stand usually excluded; and if so, no one belligerent country has a right to interfere with neutrals for acting under variations of a like kind made for similar reasons in the commercial policy of its enemy. And certainly if this proposition could be maintained without any limitation, that wherever any variation whatever is made during a war, and on account of the state of war, the party who makes it, binds himself in all the variations to which the necessities of the enemy can compel him, the *whole colony trade* of the enemy is *legalized;* and the instructions which are directed against any part are equally unjust and impertinent; for it is not denied that some such variations may be found in the commercial policy of this country itself; although some that have been cited are not exactly of that nature. The opening of free ports is not necessarily a measure arising from the demands of war; it is frequently a peace measure in the colonial system of every country: there are others, which more directly arise out of the necessities of war;—the admission of foreigners into the merchant service as well as into the military service of this country;—the permission given to vessels, to import commodities not the growth, produce, and manufacture of the country to which they belong, and other relaxations of the act of navigation, and other regulations founded thereon: these, it is true, take place in war, *and arise out of a state of*

*war;* but then they do not arise out of the *predominance of the enemies force*, or out of any necessity *resulting therefrom;* and this I take to be the *true foundation of the principle.* It is not every convenience, or even *every necessity* arising out of a state of war; but *that necessity* which arises out of the *impossibility* of otherwise providing against the urgency of distress inflicted by the hand of a *superior enemy*, that can be admitted to produce such an effect. Thns, in time of war, every country admits foreigners into its general service—every country obtains, by the means of neutral vessels, those products of the enemy's country which it cannot possibly receive, either by means of *his* navigation or its own. These are ordinary measures, to which every country has resort in every war, whether prosperous or adverse: they arise, it is true, out of a state of war, but are totally *independent of its events*, and have therefore no common origin with those *compelled relaxations of the colonial monopoly;* these are acts of distress, signals of defeat and depressicn; they are no better than partial surrenders to the force of the enemy, for the mere purpose of preventing a total dispossession. I omit other observations which have been urged and have their force: it is sufficient that the variations alluded to stand upon grounds of a *most distinguishable nature.*"

On comparing the argument of the counsel with the discourse of the judge, there is but too much room to remark, that there are in the former a coolness and clearness not unworthy of the Bench; and in the latter a florid and fervid stile, which might have been less unsuitable to the zeal of the bar. But it is more important to examine and weigh the effect which their respective reasonings, so far as those of the judge can be extricated from the general and somewhat obscure expressions employed by him, ought to have on the point in question.

The reasoning at the bar is simply this—that as Great Britain is herself in the practice of opening to neutrals, in time of war, channels of navigation and colonial markets, which she shuts to them in time of peace; she ought to allow, or might

reasonably be presumed to allow, as equally lawful in time of war, a like relaxation of the colonial system of her enemies.

The judge does not deny the fact that Great Britain is in the practice of relaxing in time of war her system of colonial trade. He does not deny the inference that a like relaxation would be equally lawful on the part of her enemies. It might have been expected, therefore, that in his reply he would have allowed to the enemies of Great Britain the same right to capture neutrals trading with her colonies, as is exercised by Great Britain against neutrals trading with the colonies of her enemies; and have contented himself with the advantage enjoyed by Great Britain in her superior means of intercepting the neutral trade with her enemies, and of preventing her enemies from intercepting the neutral trade with herself. This, it would seem, was a more consistent, and also a more politic ground to have taken. The judge was of a different opinion. Unwilling to make even that degree of concession, he attempts to retain the privilege claimed by Great Britain, and at the same time withhold it from her enemies; by certain distinctions between the two cases. With what success the distinctions are made is now to be seen.

One of the distinctions is between a colonial trade which is *frequently opened in peace*, as in the case of *free ports*, and a colonial trade opened in war only.

The example of *free ports* was not very happily chosen; for it has been seen that the trade from such ports in the French West Indies to the United States, was not excepted in the British orders on the subject of neutral trade with the colonies of France; nor is it known that any such exception has been made in the British courts of admiralty.

The distinction, however, fails in its essential point. It is not an uncommon thing for relaxations to take place *in time of peace* as well as in time of war, in the colonial monopolies of all the European nations. The Spaniards, the French, and the Dutch,* never fail to open their colonies to foreign supplies,

* It is well known that the Dutch island of Curacao as well as that

whenever a scarcity, or other cause, renders it inconvenient to supply them from European sources. Even on this ground then, as admitted by the judge himself, a neutral trade with enemy's colonies would be lawful in time of war.

Another distinction is intimated between the ordinary measures of relaxation, to which every country has resort in every war, whether prosperous or adverse, and unusual measures of relaxation produced by a peculiar state of the war.

Here again the distinction directly militates against the object for which it is made, it being well known to be an *ordinary* measure, with the enemies of Great Britain, in all modern wars at least, to open their colonial ports to neutral supplies. Prior to the American revolution, Great Britain had, in these States, resources which rendered it unnecessary for her colonies to invite supplies, if indeed they could have been obtained, from any foreign sources. In her wars since that event, she has followed the example of her enemies in relaxing her colonial system, as far as was necessary to obtain supplies, from the sources and through the channels which furnish her enemies. At this moment, her islands are as open as the colonies of her enemies to the supplies and the vessels of the United States, with this difference, indeed, that her ports are opened by regulations more temporizing and more special, than those of some, if not all, of her enemies; and therefore with pretensions to legality, according to her own standard, inferior to those of her enemies.

The remaining distinction is the sole fortress on which the defence of the principle maintained by the judge, must depend. This distinction is so novel, and in its appearance so refined, that in explaining it some difficulty was naturally felt, in the selection of apposite expressions. A critic, tinctured with want of candor, might be tempted to exclaim, that a distinc-

of St. Eustatius, has been constantly open in time of peace, to the trade of foreigners. The orders, however, of Great Britain, extend equally to those islands, with the other colonial possessions of her enemies.

tion between a necessity arising out of a state of war, and a necessity arising out of an impossibility, which impossibility arises out of a state of war, was a subject less proper for discussion, than for a less serious treatment.

The judge, however, cannot be justly charged with a want of meaning, whatever may have been his difficulty or his caution in expressing it. It may be collected, with sufficient certainty, that he meant to establish the right of Britain, and the want of right in her enemies to interrupt neutral commerce, on the predominance of force, on the decided superiority at sea, which she enjoys, and on the inferiority of force, under which her enemies labour. When she opens her colonial ports to neutrals, although it arises out of a state of war, it does not arise, like theirs, out of the predominance of the enemy's force. This predominance he frankly declares to be the *true foundation of the principle.*

And thus we are arrived at the *true foundation* of the principle which has so often varied its attitudes of defence, and when driven from one stand, has been so ready to occupy another. Finding no asylum elsewhere, it at length boldly asserts, as its *true foundation, a mere superiority of force.* It is right in Great Britain to capture and condemn a neutral trade with her enemies, disallowed by her enemies in time of peace, for the sole reason that her force is predominant at sea. And it is wrong in her enemies to capture and condemn a neutral trade with British colonies, because their maritime force is inferior to hers. The question no longer is, whether the trade be right or wrong in itself, but on which side the superiority of force lies? The law of nations, the rights of neutrals, the freedom of the seas, the commerce of the world, are to depend, not on any fixt principle of justice, but on the comparative state of naval armaments, which itself may change at every moment, may depend on the event of a battle, on the skill of an admiral, on the tack of the wind; on one of those thousand casualties which verify the admonition, that the battle is not always given to the strong, any more than the race to the swift.

A government, which avows such a principle of conduct among nations, must feel great confidence in the permanence, as well as the predominance of its own power.

It would nevertheless not be unwise in any nation, to reflect on the vicissitudes of human affairs, and to ask herself the honest question, how she would relish the application of the principle, if in the course of events, a maritime superiority should happen to change sides? Should Great Britain ever find the state of things thus reversed, she might wish, in vain perhaps, to let her claim pass silently into abeyance, as she alleges was done in the war of 1778.

Nor would it be less unworthy of her wisdom to reflect, that if a predominance of force on one element confers right, a similar right might result from a predominance of force on another element.

The supposition may be made to press more immediately on her reflections. Great Britain as a maritime power is as dependent on external commerce, as the insular dominions of her enemies are, as colonies, dependent on external supplies. In this general view, the principle which she employs against the colonies of her enemies, may be turned by her enemies against herself. But a more particular view demands her attention. She has already beheld her principal enemy on a coast little distant from her own, by a decided preponderance of force on land, and a threatened co-operation of naval armaments giving to the war an unexampled pressure on her faculties and resources. The wheel of fortune may reproduce the crisis. Her seamen may be taken from her merchant ships, to man her fleets. Her fleets may be called home from the protection of commerce, to the defence of the State. In this posture of things, her harvest may fail, her existence may depend on foreign food; its importation on neutral commerce; and the successful use of this resource, on the right of neutral ships to a navigation not open to them in times of peace. With such monitory possibilities in view, ought an enlightened nation by her own example, and her own language, to authorize her

enemies to say to her friends—you have no right to step into a trade with our enemy, from which his monopoly of the navigation excluded you in times of peace; you have no right to import for him supplies which are absolutely necessary for his support, and which the distress I am inflicting, renders it impossible for him otherwise to obtain. Neither have you any right by a trade, also forbidden in time of peace, to furnish to his colonies the supplies which his command of the sea no longer ensures to them, and without which they must fall of course into our possession.

What reply could be made to such an expostulation, by a neutral, who had not refused to recognise a like claim on the part of Great Britain; and, by the refusal, consulted better the interest of Great Britain, than she had consulted it herself in advancing the claim?

Taking leave of the very distinguished judge, with these observations, some notice is next due to Mr. Ward and Mr. Browne.

A remark that soon occurs on opening the volumes of these writers is, that both of them confound the principle here in question, with the question whether free ships make free goods, and under this confusion, bring the former within the arguments and authorities belonging to the latter only. The confusion results not only from the more general expressions in which they describe the controversy between neutral and belligerent nations, on the subject of commerce; but is promoted by their frequent use of the terms "carrying trade," without distinguishing between the carriage of enemies property in neutral vessels, and the neutral carriage of neutral property in channels navigated in time of peace by domestic carriers only. These questions are evidently and essentially distinct; and the distinction answers, of itself, much of the reasoning employed by those writers; and most, of the authorities cited by them.

With respect to the consolato del mare, so much appealed to by Mr. Ward, it has been already observed that however

direct its authority may be against the principle that enemy's property in neutral vessels is subject to confiscation, there is not a sentence in that compilation which directly or indirectly recognizes or favors a belligerent claim, to confiscate neutral property, on the principle that it is found in channels of trade not open at all to other than subjects or citizens of the belligerent, in time of peace. The negative testimony of the consolato, therefore, is completely in favor of the contrary principle.

In recurring to Grotius, Mr. Ward is led, by his own comment on the passage which describes the rights of belligerents against the trade of neutrals, to conclude that the real question before Grotius, was that which Grotius said had been so much and so sharply agitated, namely, whether a belligerent had a right to interdict *all* neutral commerce with his antagonist; and Mr. Ward accordingly takes the *defensive* ground of maintaining that the neutral "claim to a carrying trade had never entered the mind of Grotius."

If by the "*carrying trade*" Mr. Ward means the carriage of *enemy's property*, it must have been within the view of Grotius; because he has furnished Mr. Ward himself with an authority against the lawfulness of such a trade. If by the "carrying trade" he meant a trade carried on in war, where it was not allowed in peace, it is strictly true, that it appears never to have entered the mind of Grotius. It did not enter his mind, because no such particular claim had ever been asserted or exercised against neutrals. The general claim to intercept all neutral commerce with an enemy, did enter into his mind and into his discussion, as well as the other particular claims of belligerents in the case of contraband and of blockades; because as well that general claim, as those particular claims, had, at different periods, been asserted and exercised against neutrals. To suppose that the carrying trade could be unnoticed by Grotius, for any other reason than that no belligerent right to intercept that particular branch of trade, had been asserted, would be the more preposterous, for the reason suggested by Mr. Ward, "that Grotius lived in a time when his

countrymen were raising to its height the source of their commerce, by rendering their State the emporium of trade, and becoming the *carriers of the rest of the world;*" carriers as well of their own property as of the property of others, and in every channel which might be opened to them with profit to the carriers.

Notwithstanding this relinquishment of the authority of Grotius, in relation to the carrying trade, Mr. Ward has shewn a strong inclination to extract from certain terms employed by Grotius, on the subject before him, some general countenance to the British principle.

Grotius, it must be admitted, is less definite in explaining himself in this particular instance, than he is in others; and much less so, than other jurists who have succeeded him. It is impossible at the same time to put on his words, any construction that will avail Mr. Ward.

Although the passage has been heretofore analyzed, it will not be improper to re-examine it with a particular reference to the argument of this writer.

Grotius having made his distribution of the articles of neutral commerce into three classes—1st, of such as are wholly of pacific use—2d, such as are wholly military, and 3d, such as are, *usus ancipitis*—of a doubtful or double use, enlarges on this 3d class in the words following—"*In tertio illo* genere, usûs ancipitis, distinguendus erit belli status. Nam si tueri me non possum nisi quæ mittuntur intercipiam, *necessitas* ut alibi exposuimus jus dabit sub onere restitutionis, nisi causa alia accedat. Quod si juris mei executionem rerum subvectio impedierit, id que sciri potuerit qui advexit, ut si oppidum obessum tenebam, si portus clausos, et *jam* deditio aut pax expectabatur, tenebitur ille mihi de damno culpa dato, ut qui debitorem carceri eximit,"* &c., &c. He proceeds next to

* This passage stands as follows in the English translation: "As to the third sort of things that are useful at all times, we must distinguish the present state of the war. For if I cannot defend myself without intercepting those things that are sent to my enemy, necessity (as I

graduate the injuries done to the belligerent and the penalties due to the neutral, according to certain distinctions since exploded, particularly the distinction between a just and unjust war, on which he founds a rule; "Quod si præterea evidentissima sit hostis mei in me injustitia, et ille eum *in bello iniquissimo confirmet*, jam non tantum civiliter tenebitur de damno sed et criminaliter, &c."

From this text, Mr. Ward makes the following deduction: "The tenor of these words '*status belli*' which is a general de-"scription; of '*juris executione*' which is the very right to take "arms; of '*pax expectabatur*' which is a final termination of "hostilities, not surrender of the besieged place; and lastly of "'*bello confirmet*' which is demonstrably applicable to the "whole field of war: these (he says) prove him to be occupied "with the general plan of operations, and the general exigen-"cies of a state of hostility."

The great importance attached to this passage in Grotius, and the extensive consequences drawn from it by this learned champion of the British principle, will be apologies for a more critical attention to the passage, than it could be thought, of itself, to require.

Whether Grotius did or did not limit his meaning to the nature of contraband articles, and the case of blockades; it is demonstrable that his words are inapplicable to the distinction between a trade permitted, and a trade not permitted in peace.

1. According to Grotius, the articles in question are of the third class only, the class of a doubtful or double use: the principle of Great Britain makes no such distinction. Articles of every class and kind found in the new channel of trade, are

said before) will give me a good right to them, but upon condition of restitution, unless I have just cause to the contrary. But if the supply sent hinder the execution of my design, and the sender might have known as much; as if I have besieged a town or blocked up a port, and thereupon I quickly expect a surrender or a peace, that sender is obliged to make me satisfaction for the damage that I suffer upon his account as much as he that shall take a prisoner out of my custody."

rendered unlawful by the channel itself, however inapplicable they may be to the uses of war.

2. According to Grotius, it is one state of war compared to another state of war, that is to be distinguished—"*distinquendus erit belli status:*" According to Great Britain, the essence of the distinction is, between the state of war, and the state of peace; or rather between the state of the municipal laws of commerce in time of war, and the state of those laws in time of peace.

3. According to Grotius, the right to intercept the neutral commerce accrues from its particular necessity, as a measure of defence: according to Great Britain, the necessity is not the criterion. If there be no such necessity, the trade is condemned, in case the channel were unlawful before the war. Be the necessity what it may, the trade is free, if the channel was lawful before the war.

4. According to Grotius it must be such a necessity as he had elsewhere pointed out—"*ut alibi exposuimus.*" The British advocates have not undertaken to show any other passage of Grotius, giving the explanation which their principle requires. No such passage exists.

5. According to Grotius, the articles intercepted, if no other cause prevent, are to be restored. According to the British decisions, no such restitution is due. Both vessel and cargo are confiscated.

6. Finally—The war to which Grotius refers, when he uses the expression "*bello confirmet*" is a war of the most evident injustice—"*evidentissima injustitia; bello* INIQUISSIMO *confirmet,*" not *bello confirmet*, as cited by Mr. Ward. The distinction between *just* and *unjust* wars, does not enter into the principle, on which Great Britain founds her belligerent claim. It is, in fact, disclaimed by Bynkershoeck,* who succeeded

* The whole passage is criticized, and, in several particulars, censured, by Bynkershoeck: whose comment, at the same time, shews that he understood Grotius, not in the sense of Mr. Ward, but in that here assumed.—Lib. 1, C. 11.

Grotius; and tho' countenanced by Vattel, is generally understood to be excluded from questions affecting belligerent and neutral rights.

Whether the text of Grotius, therefore, is to be understood as confined, or not confined to the case of contraband and blockade, it cannot possibly be applied to the case of a trade asserted to be unlawful in war, merely as being a trade not permitted in peace.

It may be observed nevertheless, in justice to Grotius, that his meaning, ought in fairness, not to be extended beyond the cases of contraband and blockades: First, because it is the only construction that can satisfy one part of the text; whilst the terms used in the other part, are by no means, inconsistent with that construction. The expression least apposite to the case of a blockade, is that of "*pax expectabatur*," or "the expectation of peace," as an event which might be frustrated by the neutral commerce. But there may certainly be wars, where peace itself might depend on a blockade. It is obvious that a blockade of particular ports, such as that of Amsterdam, the chief emporium of the country of Grotius, might influence the question of peace, as well as the question of capitulation. Or to state a case still more decisive: a state at war, may consist of little more than the place actually blockaded. Venice and Genoa, formerly, Hamburgh at present, are examples. A close and continued blockade of such places as these, would necessarily involve a question of peace, with that of a surrender.

Again; the meaning of Grotius ought not to be extended, as Mr. Ward extends it, beyond those two cases of contraband and blockade "to the general plan of operations, and the general exigencies of a state of hostility;" because this construction is directly at variance with the principle heretofore cited from Grotius; particularly in the note where he condemns the practice of England and Holland, in their general prohibition of neutral trade with their enemy.

But the construction attempted by Mr. Ward not only puts

Grotius at variance with himself; it puts Mr. Ward at variance with himself also; as well as with the limits affixed to the principle by his own government. For if the belligerent right laid down in the passage of Grotius be not restricted to contraband and blockades, and cannot be applied to the British distinction between a trade in war and a trade in peace; but extends to the general exigency of hostilities; it is impossible to deny to belligerents a right to intercept *all* neutral trade with their enemy, whenever the state of the war, the accomplishment of justice, or the expectation of peace, prescribe it; or whenever a neutral trade may be calculated to *confirm* an enemy *in the war*. The consequence is inevitable, Yet Mr. Ward, expressly,* in another place, disclaims any such a latitude in the rights of war, with an exultation that his country had once, and once only, attempted it; and, on seeing its injustice, candidly renounced the attempt.

The observations which have been already made on Pufendorf, and on his letter to Groningius, cited by Barbeyrac, afford a conclusive reply to the use which Mr. Ward faintly endeavors to make of that authority, on the point here in question. He seems, indeed, in general, rather to combat it as an authority claimed by an opponent, than to claim it as of much weight in his own scale.

Bynkershoeck and Heineccius, though jointly cited as explicit authority for the principle that free ships do not make free goods, are neither of them appealed to by Mr. Ward as supporting the principle that a trade not allowed in peace was unlawful in war. This silence of Mr. Ward, considering his spirit of research, and his zeal for this latter principle, may reasonably be ascribed to his discovery that he could gain nothing by bringing it to the test of those authorities.

The same inference may be drawn from his silence with respect to the authority of Vattel, as to a trade of that description.

In Hubner, whose authority it is a great object with Mr.

* See Ward's Treatise, &c., p. 3.

Ward to discredit, he finds a half concession, to which he does not fail to summon a marked attention. Hubner, it seems, referring* to the case of a neutral trade with an enemy's colonies opened on account of the war, admits that it is subject to some uncertainty, "quelque incertitude." He immediately subjoins, however, "that he does not see why neutral sovereigns should refuse themselves so considerable a benefit "when it offers; provided they abstain from supplying those "colonies with any merchandize which is prohibited in war. "It is true," he adds, "if, besides that, they are careful not to "carry provisions thither, by which I mean, articles of the "first and second necessity, which, in time of war, are fully "and more than equivalent to contraband of war properly "so called; then it is *evident* that neutral nations may lawfully "carry on that commerce, because the principal cause of its "being opened to them during the war, will not have had the "effect intended to be produced; by means of which that "commerce will no longer have any thing that may directly "influence the war, and which consequently may be an object "of the right which belligerent nations have of opposing every "thing which tends to the immediate assistance of their enemies." In this ramble of Hubner, from the plain path in which he commenced his answer to the uncertainty suggested by himself, he bewilders both himself and his subject, and lays a foundation for real uncertainties, in his attempt to remove an imaginary one. How could distinctions be maintained, in practice, between provisions of the first and those of the second necessity, and between both and all other provisions? What is meant by the right which belligerent nations have of opposing *every* thing, which *tends* to the immediate assistance of their enemies?

But were the concession free from these incumbrances, it could not avail the advocates for the British doctrine: *First*, because the concession is limited to the colonial trade, not extending even to the coasting trade: *Secondly*, because it is

* Saisie, b. 1, c. 4, sec. 6.

limited to the case of those *necessary* supplies *to* the colonies, which were the object in opening the trade to neutrals; whereas the British doctrine extends to all trade *to* and *from* the colonies.

If any thing further be requisite to invalidate this fugitive concession, or rather hesitation of Hubner, it is amply furnished by Hubner himself, in sec. 5, of the same chap. and book, in which he systematically establishes principles, by which the rights of neutral commerce are to be determined.

"But let us suppose," says he, "that the commerce of a "neutral nation with one of the belligerent parties, however "innocent it may be, should indirectly strengthen the latter, "does it follow, that his adversary has a right to hinder it, "to the detriment of the neutral nation? who, in carrying it "on, neither had nor could have that particular object in view; "which merely exercises her industry as in time of peace; "and which, besides, will be very glad to trade with that "same adversary, upon the like terms, as far as his commercial "laws will permit, and the nature and interest of its own "commerce may require.

"To attempt to render a neutral State responsible for the "increase of the strength of an enemy, because that increase "arises from the commerce which that State carries on with "him, is to impute to one, a thing which he has caused by "mere accident."

Again—"Neutral nations by trading with those who are at "war, merely avail themselves of their incontestible right. "Now whoever makes use of his right, and merely does so, "never can do an injury to another, which he can have a right "to complain of. The possible consequences of just, innocent, "and lawful acts, never can hinder us from doing them, at least "there is no one who has a right to prohibit us, &c."

With such principles in his mind, it is not wonderful, that if Hubner was startled, as Mr. Ward expresses it, by the terms of his own premises, he should be more startled at his own concession; and that finding himself at a loss to explain the ground

on which such a claim as that of Great Britain could in any degree be reconciled with the rights of neutral commerce, he should be in a hurry to resume his principle, "that there is no reason why sovereign States who are neuter, should refuse the advantage presenting itself, provided they abstain from supplying colonies with contraband."

Hubner wrote in the war of 1756. Another Danish writer, Hennings, published a treatise on "neutrality," in the interval between the war of 1778 and the war of 1793. His authority is precise and peremptory against Mr. Ward.

After the capture of Grenada, and the Grenadines by the French, in the war of 1778, an act was passed by the British parliament* to "protect goods or merchandize of the growth, produce, or manufacture of those islands, on board neutral vessels bound to neutral ports during the present hostilities," with provisoes, that the protection should not extend to cargoes from any other island, nor affect any sentence of any vice admiralty court, which prior to a given day should have condemned productions of the said islands.

There is some obscurity in the object and the text of this act. To make it consistent, however, with itself, as well as with the acknowledgment on all hands, that a neutral trade in neutral property was free, during that period, with French colonies, it must be understood, as intended either to exempt the trade of those islands, which had become French, from the operation of British laws, and to put them on the same footing with other French islands; or to exempt from capture the *property* of the inhabitants of the islands, become French property and French subjects; an indulgence† that might be thought due to those

* This act being temporary, is not found in D. Pickering's statutes at large—but is inserted at full length in Hennings' collection of State papers during the war of 1778—vol. 2, p. 114.

† So great was the disposition to assuage the misfortunes of these islands, and perhaps to expiate the omission to defend them, that the Dutch, their enemies, were permitted by an additional instruction to trade with them, as also with St. Vincent and Dominica, freely as neutrals, for four months.—2 Hen., p. 105.

who had but just ceased to be British subjects, and who might be restored to that character by a peace.*

Hennings, however, conceiving the act to have been intended to legalize a neutral trade with French colonies, which otherwise might be subjected by the British courts to condemnation, is led to the following assertion of the law of nations in opposition to such a principle:

"An important subject which ought to be here noticed, is the "trade with the colonies in America. Is there any principle "on which the sugar islands in the West Indies ought to be "considered as blockaded? And if there is no such principle, "why is the permission of Great Britain required for neutral "ships to take sugars from the islands of Grenada and the "Grenadines, since those islands have fallen into the hands "of the French, and the French had opened a free trade to "Martinico, and to their other islands, &c.?"

"This law is *evidently* contrary to the rights of neutral "powers, and they might refuse to acknowledge its obligation, "as France alone has a right to permit or prohibit trading with "her colonies, and as long as she permits it, no neutral ought "to be molested therein."

Hubner and Hennings appear to be the only writers who have taken notice of the principle in question. The former having written at a period when the principle was in operation was doubtless influenced by that consideration. The attention of the latter seems to have been drawn to the subject by the act of parliament concerning Grenada and the Grenadines, which he was inserting in his collection of State papers, and by the construction which he gave to the purport of that act.

The other numerous writers of most modern date, though

* If the act is to be construed as a proof that the parliament did not think the general trade of neutrals with enemy colonies justified by the law of nations, and therefore, as requiring a special legalization by this act, it strengthens the proof that the courts thought otherwise; since they continued to release neutrals taken in the general trade with enemy colonies, in spite of the constructive denial of its legality by this act of parliament.

generally strenuous advocates for the neutral rights of commerce, make no allusion to the British principle: For it would be absurd to regard in the light of an allusion to, and consequently a recognition of this particular principle, the language they happen to use in stating the general principle, that when war arises between some nations, the nations at peace with all, are to proceed in their trade with all, on the same footing in time of war as they did before the war broke out. The obvious meaning of these phrases is, that with the particular exceptions of contraband and blockades made by all of them, the neutral right to trade with a nation at war remains the same as if that nation was at peace; and consequently the right to trade to whatever places, in whatever articles, and in whatever vessels, their regulations might mutually permit. That such must have been the intention of such writers as Galiani, Azuni, and even Lampredi, as well as of Schlegel and the German writers, cannot be questioned, without setting up a forced construction of a particular phrase, in opposition to the whole tenor of their publications; without supposing that whilst they contend for the general system of the armed neutrality, of which this is an essential principle, and have for their main object the enlargement of neutral rights, they could, by a loose stroke of the pen sacrifice a neutral right, far more important than those which they took up their pens to maintain. Such suppositions cannot for a moment be entertained. Nor indeed have any of the partizans of Great Britain undertaken to advance them.

With respect to the opinion of these very late writers, indeed, it is impossible to doubt that their sentiments are in opposition to the belligerent principle of Great Britain. If they have not been more expressly so, their silence is readily explained by the period when they wrote, that is, after the abandonment of the principle during the war of 1778, and before their attention could be called to the subject by the occurrences of the war of 1793. As late even as the year 1799, it was affirmed at the bar of the high court of admiralty, that "in the

late practice of this court, *during this war*, there have been a variety of cases from the French and Dutch colonies, in which the court has either ordered further proof, or restored in the first instance."* And in a prior case, in the same year, Sir William Scott in reply to an argument at the bar, that the illegality of a trade between the mother countries and their West Indies had been in a good measure abandoned in the decisions of the lords of appeal, does not pretend that any contrary decisions had taken place. He says only—"I am not acquainted with any decision to that effect; and *I doubt* very much whether any decision *yet made* has given even an indirect countenance to this supposed dereliction of a principle rational in itself, and conformable to all general reasoning on the subject."† Even the orders of council, commencing in January, 1793, could not have been known to these writers; and if they had, were so loosely expressed, so frequently changed, and had their effects at so great a distance from European jurists, that the innovation could not be expected to become an immediate subject of their attention and discussion.

To the incidental hesitation of Hubner, then, opposed by his own deliberate explanation of his principles, are to be opposed the direct authority of one of his countrymen, and the unanimous authority of a host of modern writers, all of a date later than Hubner, and many of them more distinguished for their talents and their erudition on subjects of public law.

It will be found that Mr. Ward is not more successful in his definitions and reasonings on this subject, than in his appeal to the authority of Jurists.

That the obscurity and uncongruity into which this heresy in public law betrays the votaries who engage in its defence, may be the better seen, Mr. Ward shall be exhibited in his own words:

"Let it be remembered, therefore, that the question on the "part of the belligerent is not, as has been grossly supposed, "whether he has a right to interfere with the neutral; but

*2 Rob., 122. † 1 Rob., 250.

"merely whether he cannot prevent the neutral from inter-
"fering with him? In other words, whether, when the former
"*extends* the bounds of his trade not *with* but *for* a belligerent;
"not only purchases what he wants for his own consumption,
"or sells his usual peace supply of articles; but sells to him
"articles which may be easily converted into the means of
"annoyance; or even turns carrier for his oppressed friend
"who uses the surplus strength which is thus afforded him
"against his opponent; whether in such case the other belli-
"gerent has no reason to be offended, and to reclaim those
"rights which the pretended neutral is disposed to deny him?
"This is in fact the true state of the question."*

"In granting, therefore, the fair and reasonable enjoyment
"of their privileges to neutral nations, there must always be
"added the fair and reasonable caution that they use them so
"as not to hurt the belligerent; and that I may not seem to en-
"trench myself in general '*ubi sæpe versatur error*,' I would
"add that they have certainly no right to use them in any one,
"the smallest degree *more* than they did in times of peace, nor
"even in so great a degree, if such augmented, or the ordinary
"use of them, bears immediate mischief to either belligerent.
"For example, they may increase their purchases to any
"amount in the belligerent countries, provided their own
"consumption required it, and provided they remain domi-
"ciled in their own country. But if they persist in carrying,
"much more, if they extend their faculty of carrying for the
"belligerent, where the latter was in the habit of carrying
"before; and if, in consequence, he is enabled to come to the
"battle, and to stand the shock of war, with augmented
"strength, which he never would nor could have possessed
"without it, I see little or no difference between this and an
"actual loan of military assistance. All the distinction is,
"that he substitutes his own people in the place of taking
"foreigners, for every man which the neutral lends to his
"trade enables him to furnish a man to his own hostile fleets.

* P. 4.

"In other words, it enables him to meet his enemy with un-
"diminished forces, and yet preserve entire his sources of
"revenue; when, if it was not for this conduct of the neutral,
"either the forces or the revenue of the belligerent must be
"diminished.*

"According to our principles, the same reason which ap-
"plies to contraband, applies to all *nocent* cases whatsoever."

A complaint in general terms that a power, which had hitherto stood by, should step in and do that for the belligerent which he was no longer able to do himself, introduces the following passage: "to come a little more into the detail and
"application of this argument, let us suppose, as was the case
"with France, a heavy duty on foreign freight had formed an
"almost fundamental law of her own commercial code; which
"in times of peace, was a kind *of navigation act amounting to*
"*an interdiction of foreign interference;* and that of a sudden,
"while engaged in war, *wanting her sailors*, perhaps her *mer-*
"*chant ships*, for hostile expeditions, at the same time wanting
"the pecuniary and other sources of her trade, which would
"thus be extinguished, she applied to nations calling them-
"selves neutral, by taking off this duty, or even by bounties,
"to carry on this trade. Here is a proof how necessary this
"trade is to her exigencies, and how impossible it is to pre-
"serve it, consistently with her warfare. But where is the
"man of plain understanding, and uninterested in the ques-
"tion, who would not determine, that if the neutral accepted
"the offer, that instant he interfered in the war, &c.?"†

"These observations apply very generally to all the carry-
"ing trade, but they more particularly apply to that specific
"claim in the first article of the armed neutrality of 1780, to
"navigate freely on the coasts, and from port to port of na-
"tions at war. In so far as the coasting trade of a nation is
"more valuable and more necessary to its existence than its
"foreign commerce; in just so far is the interposition of neu-
"trals more powerful in its favor."‡

* P. 8, 9. † P. 11. ‡ P. 12.

These extracts cannot be charged with perverting or mutilating the argumentative part of Mr. Ward's vindication of the belligerent claim in question.

The views of this claim, which Mr. Ward here gives, are, it must be confessed, so vague and so confused that it is difficult to fix on the real meaning of the writer. As far as it can be reduced to any thing like precision, he appears to be at variance with himself; and what is perhaps, not less extraordinary, at variance with Sir William Scott; sometimes going beyond the belligerent claims of the judge, and sometimes relinquishing a part of them.

Thus, on comparing him with himself, he first allows neutrals to increase their purchases to any amount; provided their own consumption require it. He next states, that the neutral privilege is not only not to be used in the smallest degree more than in peace, but not in the *ordinary degree*, if it bears immediate mischief to either belligerent. Finally, he maintains, that the same reason which applies to contraband, applies to *all nocent* cases whatsoever.

On comparing him with Sir William Scott, Mr. Ward admits that neutrals have a right to trade, so far as to purchase and increase their purchases, to the amount of their own consumption. It has been sufficiently seen that Sir William Scott, and indeed his superiors both in the admiralty and executive departments, consider the trade of neutrals, beyond the permission to trade in peace, as merely a relaxation of the rights of war. Here then he stops short of Sir William Scott.

If we are not to consider that, as his real meaning, but pass on to his next position, which denies to neutrals a trade, even in the *ordinary degree*, if it bears immediate mischief to a belligerent (by which the context will not permit us to understand any possible allusion to contraband) he here expressly contradicts Sir William Scott, who lays it down with emphasis "that the general rule is, that the neutral has a right to carry on in time of war, his accustomed trade, to the *utmost extent* of which that accustomed trade is capable."

If we recur to his last and most rigorous position, that all *nocent cases* whatever are within the reason applicable to contraband; he must be still more extensively at variance with Sir William Scott.

In support of the claim, whatever be the extent in which he means to give it, Mr. Ward urges the unlawfulness of a neutral trade, which "is not *with*, but *for* an enemy." This has been a very favorite phrase with the patrons of the British claim. It probably was first used in expressing the fiction by which neutral ships, licensed to trade with the French colonies, were converted into French ships. In its application to the subsequent pretext, which determines the channel of trade itself to be unlawful, it is not easy to find any distinct signification: If by trading *for* an enemy be meant, carrying in neutral vessels *enemy's property*, the phrase has no connection with the present question; which is not, whether enemy's property in a neutral ship be liable to capture, but whether neutral property in a neutral ship, in a particular channel, be a lawful trade: If by trading *for* an enemy be meant, carrying to or from his ports, neutral property, where he used to carry it himself; then it cannot be any thing more than trading *with*, not *for* him, during the war; as he traded with, not for the neutral nation, before the war; and the case is nothing more than a relaxation of a navigation act: If by trading with an enemy be meant, carrying neutral articles of trade, which he would neither carry himself nor permit to be carried by neutrals before the war, but the carriage of which he permits both to neutrals and to himself during the war; this can no more be *trading* FOR, *not* WITH *him*, than it was *trading* FOR, *not* WITH *each other*, for either to carry to the other during war or peace, *articles* at one time prohibited, and then permitted by the other; and the case is nothing more than a relaxation with respect to the articles of commerce; as the former was a relaxation with respect to the vessels transporting the articles. The same distinctions and inferences are generally applicable where particular ports shut, at one time, come to be opened, at another.

The essence of the argument supposed to be compressed into this equivocal phrase, thus, evaporates altogether in the analysis. It either means nothing that is true, or nothing that is to the purpose.

But the real hinge on which the reasoning of Mr. Ward turns, is, the injury resulting to one belligerent, from the advantage given to another, by a neutral whose ships and mariners carry on a trade previously carried on by the belligerent himself, and which, consequently, enables the belligerent to employ his own ships and mariners in the operations of war; without even relinquishing the revenue which has its sources in commerce. Between this and an actual loan of military assistance by the neutral, Mr. Ward can see no difference; and this is the most plausible consideration perhaps which could be urged in the cause which he defends.

But unfortunately for this defence, it is completely subverted by three other considerations:

1. The argument is just as applicable to cases where the vessels of the nation, before it was at war, were actually employed, without any *legal* exclusion of those of the neutral nation, as to cases where there was a legal exclusion of foreign vessels before, and a legal admission of them during, the war. In both cases, the belligerent vessels and seamen, as far as they are liberated by the substitution of foreign vessels and seamen, may be added to his military strength, without any diminution of his exports and imports, or of the revenues connected with them. Either, therefore, the argument must be extended (which will not be undertaken) to the latter case, or it loses its force, as to the former.

2. It has been shewn that Great Britain does herself, thus relax her navigation act; and avowedly for the purposes of substituting neutral vessels and mariners in place of those which she finds it expedient to employ in the operations of war. Mr. Ward must therefore either relinquish his argument, or condemn the practice of his own government.

3. This fundamental argument of Mr. Ward is expressly

thrown out of the question by Sir William Scott, who admits that Great Britain, like all countries, in all wars, relaxes her navigation acts and other regulations founded thereon, in order to obtain the service of foreigners with their vessels, where she did without it in times of peace; but that these relaxations, though they arise out of a state of war, do not arise from that predominance of force which he takes to be the true foundation of the principle.*

When Mr. Ward then asks, "where is the man of plain understanding, and uninterested in the question, who would not determine, that if the neutral accepted the offer, [of a trade from which the ships and seamen of the belligerent were withdrawn for the purposes of war,] that instant he interfered in the war?" A man may be named whose determination of the question, Mr. Ward, as may be inferred from his eulogies on Sir William Scott, would of all men be the last to contest.

On turning to the work of Mr. Browne, it does not appear that he has presented any views of the subject, which require particular examination. He has, in fact, done little more than appeal to the authority of Sir William Scott, and praise and repeat the arguments of Mr. Ward.

It may be thought, that some notice ought to be taken of a discourse of the present Earl of Liverpool, prefixed to his collection of treaties. It would be injustice to the distinguished author of that defence of the maritime principles of Great Britain, to deny it the merit of learning, ingenuity, and a vein of candor more than is always found in such discussions. His attention, however, was almost wholly directed to the question whether free ships make free goods, a question not within the limits of this investigation. He has, indeed, a few cursory observations, such as could not be here noticed without going into unnecessary repetitions, in favor of the doctrine that a trade not customary in peace cannot be lawful in war. These observations, he concludes, with one referred to by Mr. Ward as of great force, on the general question between belligerent

* 2 Rob., 171.

and neutral nations; namely, "that if this right were admitted, it would be the interest of all commercial States to promote dissentions among their neighbors."

If there be any plausibility in this argument, it is certainly all the merit that can be claimed for it. The wars which afflict mankind, are not produced by the intrigues or cupidity of the weaker nations, who wish to remain in peace, whilst their neighbors are at war. They are the offspring of ambitious, and not unfrequently commercial rivalships, among the more powerful nations themselves. This is a fact attested by all history. If maxims of public law are to be tested, therefore, by their pacific tendency, such maxims, it is evident, must be favored as circumscribing, not the rights and interests of neutral nations, but the belligerent and commercial interests, of their more powerful and warlike neighbors.

As a further answer to the observations of this noble author, and as a final answer to all the arguments which are drawn from the intrinsic equity or conveniency of this principle, the following considerations must have weight with all candid and competent judges.

In the first place it may be repeated, that on a question which is to be decided, not by the abstract precepts of reason, but by the rules of law positively in force, it is not sufficient to show on which side an intrinsic reasonableness can be traced. It is necessary to shew, on which side the law as in force, is found to be. In the present case, it has been shewn that this law is not for, but against, the British side of the question.

But secondly, it is denied that if reason, equity, or conveniency, were alone to decide the question, the decision would be different from that which the law in force pronounces on it.

War imposes on neutral commerce a variety of privations and embarrassments. It is reasonable, therefore, as well as lawful, that neutrals should enjoy the advantages which may happen to arise from war.

1. In the case of contraband, the articles of which, especially

according to the British catalogue, may compose an important branch of exports in time of peace, the commerce of particular nations remaining at peace may suffer material defalcations from the exercise of the rights of war.

2. In the case of enemy's property carried by neutral ships, (as Great Britain, at least, understands and enforces the law of nations,) a branch of trade more or less important to all commercial nations, and constituting the most profitable branch of trade with some in times of peace, becomes an object of belligerent interruption and confiscation.

3. In the case of blockades the abridgment and embarrassment to which the trade of neutrals, especially those at a distance, is subjected by war, form other important items of loss on their side. This is a belligerent claim, on which much might be said, if the notoriety of its effects, to say nothing of its extravagant abuses, did not render it unnecessary.

4. The interruptions, proceeding from searches of neutral vessels on the high seas, the erroneous suspicions and inferences which send them into port for trial, the difficulty of obtaining all the requisites proofs thereon by the claimant, the delays and expences incident to the judicial proceedings, more especially where the trial is at a great distance, and above all when appeals still more distant become necessary, the changes in the state of markets during all these delays, which convert into loss the gains promised by the expedition, the suspension of the mercantile funds, the heavy sacrifices, and sometimes bankruptcies thence ensuing; all these injuries, which war brings on neutral commerce, taken together, must surely, during war, require a very great weight in the opposite scale to balance them, and the weight of these injuries is sometimes not a little increased by the piracies which a state of war generates and emboldens.

The injuries, besides, which are here enumerated, are limited to such proceedings as the laws of war may be thought to authorize. To a fair estimate of the evils suffered by neutral commerce, must be added all those abuses which never fail

to be mingled with the exercise of belligerent rights on the high seas; the protracted interruptions, the personal insults, the violent or furtive spoliations, with a thousand irregularities, which are more or less inseparable from the proceeding, and which can seldom be so far verified and prosecuted to effect against the wrong-doers, as to amount to a reparation.

If the evils, brought on neutrals by a state of war, were to be traced to their full extent, a long list of a distinct kind ought moreover to be thrown into the same scale. How many condemnations are made either directly contrary to the law of nations, or by means of unjust presumptions, or abitrary rules of evidence, against neutral claimants! How often and how severely are the neutral appellants aggrieved by measuring the restitution awarded to them, not according to the actual loss, but according to the deficient estimates, or the scanty proceeds of sales, decreed by ignorant or corrupt vice admiralty courts,* in places and under circumstances, which reduce the price to a mere fraction of the value! Examples of this sort might easily be multiplied; but they may be thought of the less weight in the present case, as they furnish a just ground of resort from the ordinary tribunals of justice, to those ulterior remedies, which depend on negotiations and arrangements between the belligerent and neutral governments. But whatever may be the provisions for indemnity, obtained in these modes, it remains an important truth on the present subject, that besides the intermediate disadvantage to neutral traders from the mere delay of diplomatic and conventional remedies, the justice stipulated is always ren-

* The character of these courts may be estimated by a single fact stated on the floor of the British House of Commons, 29th April, 1801,— that out of three hundred and eighteen appeals, thirty-five only of the condemnations were confirmed by the superior court. Notwithstanding this enormity of abuses, and the strong remonstrances against them, no change was made in the courts till about four months before the war was over. They were then put on an establishment somewhat different, but which still leaves them a scourge to the fairest commerce of neutrals.

dered very incomplete, by the difficulties in verifying the losses and damages sustained.

The principle urged against a neutral trade in time of war, not permitted in peace, is the more unreasonable, because it gives to a tribunal established by the belligerent party only, a latitude of judgment improper to be confided to courts of justice, however constituted.*

* The English courts of municipal law are much celebrated for the independent character of the Judges, and the uniformity of their decisions. The same merit has been claimed for the prize courts. In answer to the objection made in a Prussian remonstrance against the condemnation of Prussian vessels during the war of 1739, viz: that the Admiralty courts were *ex parte* tribunals, and their decisions not binding on other nations, the Duke of Newcastle, in his letter enclosing the report of the four law officers, observes, "that these courts, both "*inferior* courts and courts of appeal, always decide according to the "universal law of nations only; except in those cases where particular "treaties between the powers concerned have altered the dispositions "of the law of nations." In the Report itself it is declared, "that this Superior court [Lords of Appeal] judges by the same rule which governs the court of Admiralty, viz: the law of nations and the treaties subsisting with that neutral power whose subject is a party before them;" "that in England the crown never interferes with the course of justice. No *order* or *intimation* is ever given to *any judge;*" that "had it been intended, by agreement, to introduce between Prussia and England a variation, in any particular, from the law of nations, and consequently a new rule for the court of Admiralty to decide by, it could only be done by solemn *treaty in writing*, properly authorized and *authenticated*. The memory of it could not otherwise be preserved; the parties interested, and the *courts of admiralty*, could not *otherwise* take *notice of it*." In the judgment pronounced by Sir Wm. Scott, in the case of the Swedish convoy, [1 Rob., 295,] the independent and elevated attributes of his judicial station are painted with his usual eloquence. "In forming that judgment," says he, "I trust that it has not escaped my anxious recollection for one moment, what it is that the duty of my station calls for from me, namely, to consider myself as stationed here not to deliver *occasional* and *shifting* opinions to serve present purposes of particular *national interest;* but to administer with indifference that justice which the law of nations holds out without distinction to independent States, some happening to be neutral and some to be belligerent. The seat of judicial authority is indeed locally here in the

In cases, even where the tribunal has an equal relation to both the parties, it has ever been deemed proper, that the rules of decision should be as plain and as determinate as possible; in order not only, that they might be the surer guide to those who are to observe them; but also a better guard against the partialities and errors of those who are to apply them. Say, then, whether it be not an abandonment of every reasonable

belligerent country, according to the known law and practice of nations; but the law itself has no locality. It is the duty of the person who sits here to determine this question, exactly as he would determine the same question if sitting at Stockholm; to assert no pretension on the part of Great Britain, which he would not allow to Sweden in the same circumstances; and to impose no duties on Sweden, as a neutral country, which he would not admit to belong to Great Britain in the same character. If, therefore, I mistake the law in this matter, I mistake that which I consider, and which I mean should be considered, as the *universal law* upon the question."

Does the judge either sustain these lofty pretensions, or justify the declaration of his government to Prussia, when, a few months after, in the case of the Immanuel, [2 Rob., 169,] he observes to the bar, "that much argument has been employed on grounds of commercial analogy; this trade is allowed; that trade is not more injurious; why not that to be considered as equally permitted? The obvious answer is, that the *true rule* to this court is, the *text* of the instructions. What is not found therein permitted, is understood to be prohibited, upon this general plain principle, that the colony trade is generally prohibited, and whatever is not specially relaxed continues in a state of interdiction."

He is not extricated from these inconsistencies by alleging that the instructions, the text of which was taken as his rule, was a relaxation of the law of nations within the prerogative of the crown, and favorable to the interests of the netural parties.—1. Because it was incumbent on him, if he meant to keep himself above all executive interference with the course of justice, to have reserved to him the right to test the instructions by the law of nations, instead of professing so ready and so unqualified a submission to the text of them. 2. Because without examining the extent of the royal prerogative, which depends on the local constitution and laws, it has been shewn that, in some respects, the instructions have extended the belligerent claims against neutral commerce *beyond* the law of nations, as asserted on the part of Great Britain.

precaution, while the judges have in their national prejudices, in the tenure of their official emoluments, and in their hopes of personal advancements, an exclusive relation to one of the parties; say whether it be not unreasonable to leave to the opinion, perhaps to the conjectures of a tribunal so composed, the questions whether in a distant quarter of the globe a particular trade* was or was not allowed before the war, whether

* How far the authority of this instructions has been pursued by the Hight court of Admiralty, in opposition to precedents of the Superior court settling the law of nations, is a fit subject of enquiry, for which the adequate means are not possessed.

The opinion has long and generally prevailed, that the Admiralty courts in England were not those independent and impartial expositors of the law of nations which they have professed to be; but rather the political organs of the government, so constituted as to deliver its *occasional* and *shifting* views, with reference to the occasional and shifting interests of the nation, belligerent and commercial. And it is to be regretted that this opinion is but too much countenanced by the series of royal orders and judicial decisions which the last and present war have produced. It would be an unjustifiable sacrifice of truth to complaisance, not to say, on the present occasion, that with all the merits of the illustrious civilian who presides in the high court of Admiralty, the Englishman at least is often discerned through the robes of the judge.

This want of confidence in the impartiality of the admiralty courts is the less surprizing, when it is considered that the Lords of Appeal, who decide in the last resort, are frequently statesmen, not jurists; that they not only hold their seats in that court at the most absolute pleasure of the crown, but are members of the cabinet, and it may be presumed, are, in that capacity, the original advisers and framers of the very instructions, which in their judicial capacity they are to carry into effect.

With respect to the inferior prize courts, orders directly addressed to them are neither unusual nor concealed. As an example, take the orders communicated to Mr. King by Lord Hawkesbury, above cited. Another example is furnished by the orders communicated to this government through Mr. Merry in 1804, as having been addressed to the vice admiralty courts in the West Indies, as a rule on the subject of blockades.

* See the case reported by Robinson, vol. 4, p. 267, of a vessel in the trade to Senegal, and the difficulty, expence, and delay in ascertaining

if not allowed before the war, its allowance during the war, proceeded from causes distinct from the war, or arising out of the war; whether the allowance had or had not been common to all wars; whether again, if resulting from the particular pressure of the war, the pressure amounted to a necessity; whether if amounting to a necessity, the necessity resulted from an impossibility, imposed by a decided predominance and superiority at sea, of the adverse party? These are not questions of fancy or of unfairness. They are questions which it has been seen, that the enlightened judge in the British high court of admiralty has himself recognized as involved in the principle for which he contends. But they are questions in their nature improper to be decided by any judicial authority whatever; and in their importance, they are questions too great to be left even to the sovereign authority of a country where the rights of other sovereigns are to be the object of the decision.

Finally:—The belligerent claim, to intercept a neutral trade in war not open in peace, is rendered still more extravagantly preposterous and pernicious, by the latitude which it is now assuming. According to late decisions in the British courts, it is in future to be a rule, that produce of an enemy's colony, lawfully imported into a neutral country, and incorporated into its commercial stock, as far as the ordinary regulations of a sovereign State can work such an effect, is to be subject on re-exportation to capture and condemnation; unless it can be shewn that it was imported in the preceeding voyage, with

whether the trade was or was not open before the war. A case (of Coffin, an American citizen) is now depending, which involves the question, whether the trade from the island of Java in the East Indies, to Muscat in the Persian gulph, was or was not open before the war. This question was decided in the first instance by a vice-admiralty court at Ceylon; and will probably be removed to Great Britain for a re-examination. The case, therefore, will have for its space three quarters of the globe. Through what period of time it may extend is a problem to be decided. There are precedents, as has been already seen, for ten years at least.

an intention that it should not be re-exported. Consider for a moment the indignity offered to a neutral sovereign in subjecting the integrity of its internal regulations to the scrutiny of foreign courts, and to the interested suspicions of belligerent cruizers; consider the oppression on the individual traders, inseparable from a trial in a distant court, and perhaps an appeal to another court still more distant, where the intention of an antecedent voyage is to be traced through all the labyrinth of mercantile transactions. A neutral vessel goes to sea, with a cargo consisting, in whole or in part, of colonial produce. It may be the produce of a *neutral* colony. It may be the produce of the country exporting it: The United States already produce cotton, sugar, rice, &c., as well as the West Indies. The cruizer does not forget, that the proof will probably be thrown on the claimants; that besides the possibility that it may be a licensed capture, the difficulty of proof may have the same effect in producing condemnation. He recollects also that in the event of an acquittal the costs* will, where there is the least color for seizure, be thrown on the claimants; and that, at the worst, he can only be put to the inconvenience of giving up a few men to take charge of the prize, in exchange for a few others, not unfrequently *impressed into the vacancy*. In a word, his calculation is, that he may gain, and cannot lose. Will not, under such circumstances, every hogshead of sugar, or bale of cotton, or barrel of rum, &c., be a signal for detention? Could ingenuity devise a project holding out a more effectual premium for the multiplication of vexations searches and seizures, beyond even the ordinary proportion of condemnations? A project, in fact, more unjust in itself, more disre-

* It is well known to be the practice to favor the activity of cruizers against the colonial trade. Sir William Scott in the case of the Providentia, in which the ship and cargo were restored—2 Rob., 128, says, "Cases respecting the trade of neutrals with the colonies of the enemy are of considerable delicacy; and I therefore think it has been properly brought before the court."

spectful to neutral notions, or more fatal to the liberty and interests of neutral commerce? Would Great Britain be patient under such proceedings against her, if she held in her hands, the means of controuling them? If she will not answer for herself all the world will answer for her, that she would not, and what is more, that she ought not.

## TO JAMES MONROE AND WILLIAM PINKNEY.

D. OF S. MSS. INSTR.

DEPARTMENT OF STATE May 17—1806.

GENTLEMEN,

I herewith enclose a Commission and letters of credence authorizing you to treat with the British Government concerning the maritime wrongs which have been committed, and the regulation of commerce and navigation, between the parties. Your authority is made several as well as joint, as a provision for any contingency depriving either of the co-operation of the other.

The importance of the trust is evinced by its being made the occasion of an Extraordinary Mission, as well as by the subjects which it embraces. And I have great pleasure in expressing the confidence which the President feels in the prudence and talents to which the business is committed.

It is his particular wish that the British Government should be made fully to understand that the United States are sincerely and anxiously disposed to cherish good will and liberal intercourse between the two nations, that an unwillingness alone to take measures not congenial with that disposition has made them so long patient under violations of their rights and of the rules of a friendly reciprocity; and when forced at length by accumulating wrongs to depart from an absolute forbearance, they have not only selected a mode strictly pacific, but in demonstration of their friendly policy,

have connected with the measure, an extraordinary mission, with powers to remove every source of difference, and even to enlarge the foundations of future harmony and mutual interest.

There can be the less ground of umbrage to the British Government, in the Act prohibiting the importation of certain Articles of British manufacture 1st because there is nothing on the face of the Act beyond a mere commercial regulation, tending to foster manufactures in the United States, to lessen our dependence on a single nation by the distribution of our trade, and to substitute for woolens and linens, manufactures made from one of our principal agricultural staples. 2nd because it is far short of a reciprocity with British exclusions of American Articles of export. 3d because as a commercial measure discriminating in time of war, between British and other nations, it has examples in British practice. It deserves attention also that a discrimination was made, and under another name still exists, in the amount of convoy duty imposed on the trade between Great Britain with Europe, and with America. 4th because the measure cannot be ascribed to a partiality towards the enemies of Great Britain, or to a view of favoring them in the war; having for its sole object the interest of the United States, whch it pursues in a mode strictly conformable to the rights and the practice of all nations.

To observations of this kind it may be useful to add that the measure was undertaken before the late change in the British Ministry, and does not therefore imply any particular distrust of the views of the new one, but merely a belief that it was most consistent with self respect not to be diverted, by an occurrence of that nature, from a ground which had been deliberately and publickly assumed; not to mention that no assurances sufficiently decisive had been received that a disposition to correct the evil in question predominated in the present Cabinet; whilst it was known that some of its most distinguished members have heretofore been among

the warmest champions of the maritime doctrines in which those evils have their origin.

In one respect the act may even be favorable to the objects of the present Cabinet, if it should be disposed to make unpopular concessions refused by their predecessors; since concessions alone can now regain a lost market for certain important and popular classes of British manufactures.

In fine the Act may truly be represented as so far from derogating from the amicable dispositions of the United States towards Great Britain, that it has resulted solely from the inefficacy of their protracted and reiterated endeavors otherwise to obtain a just redress, and from a hope that an appeal in this peaceable form to the reflections and interests of an enlightened nation, would be more successful in removing every obstacle to a perfect and permanent cordiality between the two nations.

The instructions given to Mr. Monroe Jan'y 5– 1804, having taken into view, and being still applicable to a great proportion of the matter now committed to your joint negotiations, it will be most convenient to refer you to those instructions as your general guide, and to confine the present, to the alterations and additions, which a change of circumstances, or a contemplation of new objects may require.

The first article of the project comprized in the instructions of 1804, relates to the impressment of seamen. The importance of an effectual remedy for this practice, derives urgency from the licenciousness with which it is still pursued, and from the growing impatience of this Country under it. So indispensable is some adequate provision for the case, that the President makes it a necessary preliminary to any stipulation requiring a repeal of the Act shutting the Market of the U. States against certain British manufactures. At the same time he authorizes you in case the ultimatum as stated in the Article above referred to, should not be acceptable

to the British Government, to substitute one in the terms following—"No seaman nor sea faring person shall upon the high seas, and without the jurisdiction of either party, be demanded or taken out of any ship or vessel, belonging to the Citizens or subjects of one of the parties, by the public or private armed ships or men of war belonging to or in the service of the other party; and strict orders shall be given for the observance of this engagement."

An article in these terms was, with the acquiescence of Lord Hawkesbury and Mr. Addington, concerted between Mr. King and lord St Vincent on the approaching renewal of the late war. It was frustrated by an exception of the "narrow seas", inserted by Lord St Vincent; an exception so evidently inadmissible both in principle and in practice, that it must have been intended as a pretext for evading the stipulation at that time. Perhaps the present Ministry may neither be disposed to resort to such a pretext, nor unwilling to avail themselves of the precise sanction as far as it was given by their predecessors.

With respect to contraband which is the subject of the 4th art, it may be observed that as it excludes naval stores from the list, and is otherwise limited to articles strictly military, it must be admissible to Great Britain, [and] leave but feeble objections to an abolition of contraband altogether. In the present state of the arts in Europe, with the intercourse by land, no nation at war with Great Britain can be much embarrassed by leaving those particular articles subject to maritime capture. Whilst belligerent nations therefore have little interest in the limited right against contraband, it imposes on neutrals all the evils resulting from suspicious and vexatious searches, and from questions incident to the terms used in the actual enumeration. It is not an unreasonable hope therefore, that in place of this article, an entire abolition of contraband may be substituted. Should this be found unattainable, it may be an improvement of the Article, as it stands, to subjoin for the sake of greater caution.

to the positive enumeration, a negative specification of certain Articles, such as provisions, money naval stores &c as in no case to be deemed within the meaning of the article with a proviso, that the specification shall not be construed to imply in the least, that any articles not specified in the exception, shall on that account be liable to be drawn into question.

A doctrine has been lately introduced by the British Courts and at length adopted by the instructions of June 1803, to British Cruizers, which regards contraband conveyed in one voyage as affecting a resumed or returning voyage, altho' contraband shall have been previously deposited at its port of destination. It will be a further improvement of the Article to insert a declaratory clause against the innovation, and the abuses incident to it.

The 4th article, besides the stipulation on the subject of contraband, relates to two other subjects; 1st That of free ships free goods, 2nd that of a trade with enemy's Colonies.

1st. With respect to the first, the principle that a neutral flag covers the property of an enemy, is relinquished, in pursuance of the example of the Russian Treaty on which the article is modelled; the relinquishment however being connected with and conditioned on, the provision required in favor of the neutral right to the Colonial Trade. The importance of that principle to the security of neutral commerce, and to the freedom of the seas, has at all times been felt by the United States; and altho' they have not asserted it as the established law of nations, they have ever been anxious to see it made a part of that law. It was with reluctance, of course, that a contrary stipulation was authorized, and merely as a mean of obtaining from Great Britain, the recognition of a principle now become of more importance to neutral nations possessing mercantile Capital, than the principle of "free ships free goods." It is to be particularly kept in view therefore that such a contrary stipulation is to be avoided if

possible, and if unavoidable that the stipulation be so modified as to interfere as little as possible with the spirit and policy of any provisions in favor of the principle which may be likely to be introduced into a Treaty of peace among the present belligerent powers of Europe. Should it be known that Russia as well as France meant to insist on such a provision, and that such a stipulation by the United States however modified, will naturally affect her confidence and good will towards them, the objection to the measure will acquire a force that can yield only to the consideration that without such a sacrifice the provisions for the security of our seamen, and of our neutral commerce, cannot be obtained and that the sacrifice will effectually answer these purposes.

2d. The vast importance of the Colonial trade, with the circumstances and the excitement which have taken place since the date of the Original instructions to Mr. Monroe, will require that the neutral right on this subject, be provided for in an appropriate Article, and in terms more explicit than are used in the Article under review. As the right in this case, turns on the general principle that neutrals may lawfully trade, with the exception of Blockades and contraband, to and between all ports of an enemy and in all Articles, altho' the trade shall not have been open to them in time of peace, particular care is to be taken that no part of the principle be expressly or virtually abandoned, as being no part of the law of nations. On the contrary it is much to be desired that the general principle in its full extent, be laid down in the stipulation. But as this may not be attainable and as too much ought not to be risked by an inflexible pursuit of abstract right, especially against the example and the sentiments of great powers having concurrent interests with the United States; you are left at liberty if found necessary to abridge the right in practice, as it is done in the supplement of Octr 1801 to the Treaty of June of that year, between Russia and Great Britain; not omitting to provide that in case Great Britain should by her Treaties or instruc-

tions leave to any other nation the right in a greater extent than it is stipulated to the United States, they may claim the enjoyment of it in an equal extent.

The abuses which have been committed by Great Britain under the pretext that a neutral trade, from enemy Colonies, through neutral ports, was a direct trade, render it indispensable to guard against such a pretext by some express declaration on that point. The most that can be conceded on the part of the United States, is that the landing of the goods, the securing the duties, and the change of the ship, or preferably the landing of the goods alone, or with the securing the duties, shall be requisite to destroy the identity of the voyage and the directness of the trade, and that the ordinary documents of the Custom House officers, shall be sufficient evidence of the facts or fact.

A satisfactory provision on this subject of a trade with enemy Colonies, is deemed of so much consequence to the rights and interests of the United States, and is so well understood to have been contemplated along with a like provision against the impressment of seamen, in the late Act of Congress prohibiting the importation of certain classes of British Manufactures that, as was enjoined with respect to the provision against impressment, no stipulation is to be entered into not consistent with a continuance of that Act, unless the provision with respect to the Colonial trade be also obtained.

In remodelling the provision with respect to the Colonial trade, you may with great propriety urge a distinction between the West India Colonies, and the very distant ones in the East Indies and elsewhere; and the reasonableness of limiting to the former, the exception of the direct trade with their present Countries, out of the general neutral right. The distinction is supported by several considerations, particularly by the greater difficulty, in the case of the more distant Colonies, of previously knowing, and eventually proving the regulations as they may have actually stood in time of peace;

and by the ruinous delays and expences attending the judicial investigations. The British Courts have in fact admitted the distinction so far as to presume the lawfulness of the neutral trade with the East India Colonies, as being generally open in peace as well as war; whilst they reverse the presumption with respect to the West Indies.

In addition to what is proposed on the subject of blockades in VI & VII articles, the perseverance of Great Britain in considering a notification of a blockade, and even of an intended blockade, to a foreign Government, or its Ministers at London, as a notice to its Citizens, and as rendering a vessel wherever found in a destination to the notified port, as liable to capture, calls for a special remedy. The palpable injustice of the practice, is aggravated by the auxiliary rule prevailing in the British Courts, that the blockade is to be held in legal force, until the Governmental notification be expressly rescinded; however certain the fact may be that the blockade was never formed or had ceased. You will be at no loss for topics to enforce the inconsistency of these innovations with the law of nations, with the nature of blockades, with the safety of neutral commerce; and particularly with the communication made to this Government by order of the British Government in the year 1804; according to which the British Commanders and Vice Admiralty Courts, were instructed "not to consider any blockade of the Islands of Martinique and Guadaloupe as existing unless in respect of particular ports which may be actually invested, and then not to capture vessels bound to such ports unless they shall previously have been warned not to enter them."

The absurdity of substituting such diplomatic notifications in place of a special warning from the blockading ships, cannot be better illustrated than by the fact, that before the notification of a proposed blockade of Cadiz in the year 1805 was received here from our Minister at London, official information was received from Cadiz, that the blockade had actually been raised, by an enemy's fleet.

It may be worth your attention that a distinction has been admitted by the British Courts, in consideration of the distance of the United States from the European Blockades, between their Citizens and those of States less distant; the notice required for the former being more positive than is made necessary for the latter. You will be able to avail yourselves in the discussion, and perhaps in the modification of the Article, of the reasons on which such a distinction rests.

The instructions in the hands of Mr. Monroe are silent with respect to Convoys. If the footing on which the neutral right on that subject is placed by the Russian and British Treaty of 1801, can be turned to advantage in your negotiations, and should be understood to coincide with the present way of thinking of Russia and other maritime powers, an article corresponding with the regulations in that Treaty, may be admitted. But as the United States are not in the practice of Convoying their trade, nor likely to be so within the period of any stipulation now to be made, and as the progress of opinion is rather favorable than discouraging to the enlargement of neutral rights, it is in a general view desirable that any stipulation, such as Great Britain will probably admit, should at this time be entered into. In whatever arrangement on the subject limiting the protecting right of public ships of war, may be deemed expedient, you will be careful so to express the limitation, that it may be applied to the exercise of the right without affecting the abstract right itself.

There remains as an object of great importance, some adequate provision against the insults and injuries committed by British cruizers in the vicinity of our shores and harbors. These have been heretofore a topic of remonstrance, and have in a late instance, been repeated with circumstances peculiarly provoking, as they include the murder of an American seaman within the jurisdictional limits of the United States. Mr. Monroe is in full possession of the documents explaining a former instance. Herewith will be received those relating

to the late one. They not only support a just demand of an exemplary punishment of the offenders and of indemnity for the spoliations, but call for some stipulations guarding against such outrages in future. With this view it is proper that all armed belligerent ships should be expressly and effectually restrained from making seizures or searches within a certain distance from our Coasts, or taking stations near our harbours, commodious for those purposes.

In defining the distance protected against belligerent proceedings, it would not perhaps be unreasonable, considering the extent of the United States, the shoalness of their coast and the natural indication furnished by the well defined path of the Gulph stream, to expect an immunity for the space between that limit and the american shore. But at least it may be insisted that the extent of the neutral immunity should correspond with the claims maintained by Great Britain, around her own territory. Without any particular enquiry into the extent of these, it may be observed 1 That the British Act of Parliament in the year 1730—9 G. 2 C. 35 supposed to be that called the Hovering Act assumes for certain purposes of trade, the distance of four leagues from the shores. 2 That it appears that both in the Reign of James I and of Charles II [1] the security of the commerce with British ports was provided for, by express prohibitions against the roving or hovering of belligerent ships so near the neutral harbours and coasts of Great Britain as to disturb or threaten vessels homeward or outward bound; as well as against belligerent proceedings generally within an inconvenient approach towards British territory.

With this example, and with a view to what is suggested by our own experience, it may be expected that the British Government will not refuse to concur in an Article to the following effect.

"It is agreed that all armed vessels belonging to either

[1] See *L. Jenkins*, vol. i. and vol. ii.

of the parties engaged in war shall be effectually restrained by positive orders and penal provisions from seizing, searching or otherwise interrupting or disturbing vessels to whomsoever belonging, and whether outward or inward bound within the harbours, or the Chambers formed by headlands, or anywhere at sea within the distance of four leagues from the shore, or from a right line from one head-land to another; it is further agreed that by like orders and provisions all armed vessels shall be effectually restrained by the party to which they respectively belong, from stationing themselves, or from roving or hovering, so near the entry of any of the harbours or coasts of the other, as that Merchantmen shall apprehend their passage to be unsafe, or a danger of being set upon and surprised; and that in all cases where death shall be occasioned by any proceeding contrary to these stipulations, and the offender cannot, conveniently be brought to trial and punishment under the laws of the party offended he shall on demand made within months be delivered up for that purpose."

If the distance of four leagues cannot be obtained, any distance not less than one sea league may be substituted in the Article. It will occur to you that the stipulation against the roving and hovering of armed ships on our coasts so as to endanger or alarm trading vessels, will acquire importance as the space entitled to immunity shall be narrowed.

Another object not comprehended in the instructions of 1804 to Mr. Monroe, is rendered important by the number of illegal captures and injuries, which have been committed by British Cruizers since that date. An indemnity for them is due on every consideration of justice and friendship and is enforced by the example heretofore given by Great Britain herself, as well as by other nations which have provided by Treaty for repairing the spoliations practised under colour of their authority. You will press this as an object too reasonable not to be confidently expected by the United States. Many of the claims indeed for indemnification are so obviously

just that a refusal to satisfy them, cannot be decently made, and ought not therefore to be presumed.

The two modes most readily presenting themselves for a comprehensive provision for the claims, are first the establishment of a Board analogous to that provided for in the 7th Art of the Treaty of 1794; secondly, the substitution of a gross sum to be distributed among the claimants according to a liquidation to be made under the authority of the United States.

The second is the most eligible, if the gross sum to be allowed, be thought to approach the amount of losses to be indemnified. To assist you in estimating these, the statements addressed to this Department by the underwriter and others, are herewith transmitted. These statements with those furnished by Mr Lyman to Novr 1st will be [have?] to be reduced according to the redress which shall have been judicially afforded, and on the other hand to be augmented by the addition of cases not reported here, and to be collected from the sources of information within your own reach.

If the first mode should be adopted, great care will be requisite, in describing the cases, to employ such general terms as will comprehend all that are fairly entitled to redress. It will be well at the same time to secure, by specifying, such of the cases as can be specified and as are least susceptible of objection. Under this head may be classed 1 cases in which the official communication made by Lord Hawkesbury to Mr. King of the 11th day of April 1801 has been violated 2d Cases in which the rules of blockade stated in Mr. Merry's communication to the Department of State on the 12th day of April 1804 have been violated. 3d Cases where the territorial jurisdiction of the United States has been violated.

The list of neutral rights asserted in the Report of the Secretary of State to the President on the 25th day of Jany 1806, will suggest other specifications which may be attempted. It may be worth recollecting that the British order of Council

bearing date 24th June 1803, and subjecting to capture vessels on a return voyage, which had carried contraband in the outward voyage, was never promulgated, nor was it known that such a rule was to be enforced until the summer of 1805. Could the rule be regarded otherwise than as it certainly is, an innovation on the law of nations, all captures before it was made known, and contrary to antecedent practice, would be marked by an unjust surprise, fairly entitling them to redress.

The business to come before such a board may be much diminished by the reference of cases, particularly of costs and damages and such others whose description by common consent entitles them to redress, to the Kings Advocate and an Advocate to be named on your part (Dr. Laurence for Example) who may be authorized to report the sums due, subject to the approbation in each case of Mr. Lyman our Agent. As far as the cases fall within the observation here made, a liquidation of them may be carried on during the period of negotiation.

Altho' the subject of indemnifications for past wrongs is to be pressed as of great magnitude in a satisfactory adjustment of our differences with Great Britain; yet as the British Government may be inflexible in refusing an arrangement implying that her maritime principles of capture were contrary to the law of nations, whilst she would not be inflexible in stipulating a future practice conformable to our wishes, it is not thought proper that a provision for indemnities should be an absolute condition of the repeal of the Act of Congress concerning British manufactures, provided satisfactory arrangements shall be made relative to impressments, and the trade with enemy's Colonies. Still however it is to be kept in view that there are claims founded on Acts of British cruizers violating the law of nations as recognized by Great Britain herself, and others founded on unexpected departures, without notice from rules of practice deliberately settled and formally announced. Of these, examples have

been referred to in the communication of Lord Hawkesbury to Mr. King and of Mr. Merry to the Department of State.

With respect to claims of these several kinds, it is evident that provision is clearly due for them, and that it may be made without implication which can alarm the pride or the caution which may be professed. You will not fail therefore. to bring if necessary, these claims into view, as distinguished from others founded on controverted principles, and to let it be understood that a refusal of them will be a painful ingredient in the negotiations for extinguishing discontents on both sides, and consolidating and perpetuating the friendship between them. In case this distinction should operate in the adjustment, it will furnish an additional reason for preferring a gross sum, to the liquidations of a joint Board, first because it will admit of a liberal sum, if the British Government should be liberally disposed, on presumptions not affecting her maritime principles. Secondly, because it will leave the United States free to apply the gross sum, in redressing claims, according to our maritime principles. A precedent for such an expedient may be found in the Convention of Jany 1756 between Great Britain and Persia; whereby a gross sum of £20,000 sterling was paid to the latter as an extinguishment of claims on account of illegal captures, without reference to the precise rules by which it was to be applied. The treaty of Pardo in Jany 1739 between Great Britain and Spain, is another precedent. In that Treaty the sum of £95,000 sterling was stipulated in the like general manner, to be paid to Great Britain by Spain, as a compromise for all reparation of maritime injuries.

If the United States succeed in making satisfactory arrangements on the principal points of impressment of seamen, Colonial trade, and still more if provision be also made for indemnity for spoliations, it may be naturally expected that Great Britain will require, not only the repeal of the prohibitory act of last Session, but also some security that the United States will not by subsequent acts of the same nature

place her on a worse footing than other nations. She may reasonably urge that demand on the double plea, of having yielded on those points which were the subjects of complaint on the part of the United States, and of her being now for want of a Commercial Treaty placed in that respect at the discretion of the United States; whilst they are precluded by their Treaties with the enemies of Great Britain (Holland, France and Spain) from the power of laying prohibitions or restrictions particularly affecting those nations.

The most natural arrangement in that respect will be simply to agree that the two parties shall enjoy in the ports of each other in regard to commerce and Navigation, the privileges of the most favored nation. But the Article should be framed so as to embrace 1st every privilege and particularly the exemption from higher duties of every description either on imports or exports and including Convoy duties, that are paid by the most favored nation; 2dly all the possessions of Great Britain in every port of the world; which will secure admission at all times in both East and West Indies, on the same terms as are now or may in future be enjoyed by the most favored nation, whether it be a friend or an enemy.

The same clause of the footing of the most favored nation may be extended not only to navigation and Commercial intercourse between the two nations, but to points which relate to the rights and duties of belligerents and neutrals: an arrangement which would secure to Great Britain the same rights in relation to the admission of her armed vessels in our ports and to the exclusion of her enemies privateers and of their prizes, which are now enjoyed by Holland, Spain and other most favored nations: whilst it would place the rights of the United States as neutrals on the same footing with Russia or the most favored nation in respect to search, Convoys, blockades and contraband.

If, it shall be thought eligible to place the reciprocal commercial privileges of the two nations on a more definite basis than they would be placed by the general expression of the

most favored nation (a stipulation which is liable to the difficulty of ascertaining the equivalent to be given in cases where a privilege is granted by one of the contracting parties to another nation in exchange for some favor which the other contracting party cannot specifically give) it may be done, either by abolishing all alien duties either on vessel or cargo, or both, and reciprocally placing the vessels of the other nation on the same footing with national vessels; conformably to a provision in which Great Britain concurred by an Act of Parliament in the year 1802 or by fixing the maximum of alien duty which each nation shall have the right to impose on the vessel or Cargoes of the other nation. But should the last plan be adopted, care must be taken 1st that in fixing the maximum of the alien duty to be levied on vessels, all charges whatever and under whatever name known, whether tonnage Light House money, port charges &c. shall be included. 2dly That the maximum of the alien duty to be levied on merchandize imported in the vessels of the other nation (beyond the duties levied on similar Articles imported in the national vessels) shall be a per centage on the value of the merchandize itself and not on the original duty 3dly that the right of imposing such maximum duties either on the vessels or merchandize shall never be exercised so as to contravene the other stipulation of enjoying the privileges of the most favored nation 4thly That the stipulation shall not embrace vessels and cargoes coming from or going to ports from which the vessels or cargoes of the United States are excluded.

Should the expedient of a Maximum be adopted, it must not be overlooked that the productions of the United States exported to Great Britain employ a far greater tonnage than the exports from Great Britain to the United States; that the higher the maximum therefore the more favorable to Great Britain, who may avail herself according to the degree of it to secure to her vessels the carriage of our bulky productions, of which her duty on Tobacco imported in American vessels is an example; leaving to the United States the opportunity

only of securing to their vessels the carriage of her unbulky exports; and that consequently no maximum ought to be admitted more unfavorable to the United States, than the regulations likely to prevail, if uncontrouled by Treaty. A mutual abolition of alien duties would probably be favorable to the Navigation of the United States, which would then have to contend on equal terms with British Navigation, for which it may be expected to be at least a match at all times, and more than a match when Great Britain is at War, which is not less than half the time.

The only great branch of Commercial intercourse which would remain unprovided for, is that of intercourse with the British Colonies and dependencies: and if nothing can be obtained on that ground, care also must be taken in framing the Article for reciprocally enjoying the privileges of the most favored nation, not to deprive the United States of the right of making such regulations as they may think proper in relation to vessels coming from ports from which their own vessels are excluded, or in relation generally to the intercourse with such ports.

As the United States confer no particular benefit on the British possessions in the East Indies by their intercourse with that Country, it can hardly be expected that Great Britain will grant anything more than the general stipulation to be placed on the footing of the most favored Nation; or possibly a stipulation to the United States of the privileges heretofore granted to foreigners, which in relation to the coasting trade, and the trade from India ports to all foreign Countries as well as that owning the vessel exceeded the privileges stipulated in the Treaty of 1794.

But as relates to the West Indies and North American Colonies it must be a permanent object of the United States, to have the intercourse with them made as free as that with Europe. The relative situation of the United States and those Colonies, and particularly those wants which we can alone supply, must necessarily produce that effect at some no very

distant period. And it should not be voluntarily retarded either by abandoning by Treaty the strong hold which our right of stopping the intercourse gives us; or by accepting any temporary or trifling privilege, the exercise of which would diminish the probability of soon obtaining a perfectly free trade.

It is not probable that Great Britain will be disposed to open the intercourse to our vessels with her North American Colonies; nor does it appear that any limitation or restriction can be offered by the United States, calculated to quiet the apprehensions of Great Britain that to open that trade to our vessels would destroy their own. It is not perceived that any thing else can be proposed but perfect reciprocity as is contemplated in relation to the Intercourse between the United States and the British dominions in Europe, such reciprocity to consist either of a total abolition of alien duties or of a fixed Maximum as above stated; and the intercourse to be also either general or confined to Articles of the growth, produce or manufacture of the United States and of the said Colonies respectively. It must not be fogotten, as relates to our commerce with Nova Scotia and New Brunswick that however advantageous to both parties, it is more beneficial to the United States than to those Colonies. The importation of not less than 30, perhaps 50 thousand tons of Plaister to our agriculture needs no comment; and notwithstanding our exclusion from their ports, we have in fact, as the trade has hitherto been carried on, a greater share of it than themselves. This however is the result of a connivance in practice which may possibly be withdrawn. The produce of their fisheries is brought by them from Halifax to Boston, and by us from Boston carried to the West Indies. Their plaister is brought by them from Fundy Bay to Maine, and by us from Maine to New York, Philada and the Chesapeake. A strong jealousy seems to exist between the shipping interest of Massachusetts and that of those Colonies. Hence the wish of their legislative assemblies to prohibit the exportation of plaister

in their own vessels to our Eastern ports; and hence the law which laid the light House money tax and a high duty on their fish, taking away at the same time the drawback of the re-exportation of such fish. An enlightened policy and a mutual wish to promote the real interest and welfare of the inhabitants on both sides, should induce both Governments to throw the trade perfectly open. But it cannot be denied that it will give us a very great share of their carrying trade.

The minimum which should be accepted in relation to the intercourse with theWest Indies, will be the admission of our vessels laden solely with Articles of our growth, produce or manufacture, the importation of which [in] British vessels is not prohibited, on the same terms as British vessels solely laden with the Colonial Articles shall be admitted in our ports, that is to say, either without alien duties or with a fixed maximum of such alien duties with the two following restrictions. 1st. That Great Britain may prohibit our vessels from exporting from the British West India Islands in Sugar and Coffee, more than one half of the proceeds of their inward Cargoes. 2dly That such Sugar and Coffee shall be exported only to the United States, or that the vessels thus admitted in the West Indies shall be obliged to return and land their Cargoes in the United States, provided they may however, on their return touch at any other West India Island or the Bahamas to complete their cargo. For it is usual to carry the specie which proceeds from the sale of a cargo in the West Indies to Turks Island or the Bahamas and there load with Salt for the United States. Altho' those restrictions and particularly the first be inconvenient, yet they may be acquiesced in. As respects the first restriction the value of our average exportation, to the British West India Islands, being Six Millions of dollars and our exportations from thence in every article (Sugar & Coffee excepted) being three Millions of dollars the privilege of bringing in return in Sugar & Coffee one half of the value of our exporta-

tions will just complete the return cargoes. But it would be desirable that the restriction should be altogether dispensed with or that Great Britain should allow the exportation in those two Articles to the amount of $\frac{2}{3}$ or $\frac{3}{4}$ of the value of our Cargoes. As relates to Great Britain, if she once yields the point of admission, the restrictions which are proposed seem to be amply sufficient to remove her minor objections. We now import notwithstanding the nominal prohibitions to some amount in American vessels: about one million and a half dollars being the whole amount imported from the British islands, in both American and British vessels. The value of our average importations from all the world is in sugar, 7,800,000 in coffee 8,400,000, or more than 16 Millions of dollars. The value of our annual consumption exclusively of the New Orleans Sugar, is in sugar 4,000,000 in coffee 1,500,000 or 5½ Millions of dollars.

To permit us therefore to import for 3 millions cannot enable us to re-export. And three millions of dollars compared with the value of the Sugar and Coffee exported annually from the British West Indies which amounts to less than millions cannot in any degree affect their own commerce or navigation.

The second restriction is intended still more effectually to remove any apprehension that our vessels might become carriers of British West India produce to any other Country than the United States. And it may even if insisted on, be farther agreed that no drawback shall be allowable on the re-exportation of those Articles imported from the British West Indies in American vessels, provided, however, that on that condition the first mentioned restriction limiting the quantity which may be thus imported from the British West Indies in American vessels, shall be dispensed with. The utmost care is to be taken in framing the restriction on re-exporting from the United States, the produce of the British West Indies, imported in American vessels, so to express it as to leave no possible pretext for applying the restriction to any similar Articles,

whether produced within the United States, or imported from any other than English possessions.

It will be a reasonable Stipulation on the part of Great Britain, that at all times and places at which the trade of the United States is admitted generally or partially the residence of Consuls and factors shall also be admitted.

The duration of the Commercial part of the Treaty and of any other parts which do not establish in their full extent, the rights of neutral nations, ought not to succeed the term of Eight years; and an abridgment even of that term may perhaps be rendered expedient by the tenor of Articles not inconsistent with those instructions.

I have the honor to be, Gentlemen &c

## TO JAMES MONROE AND WILLIAM PINKNEY.

D. OF S. MSS. INSTR.

DEPARTMENT OF STATE, February 3d 1807.

GENTLEMEN,

The triplicate of your communications of Nov. 11th has just been received. Those of Sept. 12th had been previously received in due time.

The turn which the negotiation has taken, was not expected, and excites as much of regret as of disappointment. The conciliatory spirit manifested on both sides, with the apparent consistency of the interest of Great Britain, with the right of the American flag, touching impressment, seemed to promise as much success to your efforts on the subject as on the others, and, notwithstanding the perseverance of the British Cabinet in resisting your reasonable propositions, the hope is not abandoned that a more enlightened and enlarged policy will finally overcome scruples which doubtless proceed more from habits of opinion and official caution, than from an unbiased regard to all the considerations which enter into the true merits of the question.

In the meantime the President has with all those friendly

and conciliatory dispositions which produced your mission, and pervade your instructions, weighed the arrangement held out in your last letter which contemplates a formal adjustment of the other topics under discussion, and an informal understanding only, on that of impressment. The result of his deliberations, which I am now to state to you, is, that it does not comport with his views of the national Sentiment or the Legislative policy, that any Treaty should be entered into with the British Government which, whilst on every other point it is either limited to, or short of strict right, would include no article providing for a case which both in principle and in practice is so feelingly connected with the honor and sovereignty of the Nation, as well as with its fair interests; and indeed with the peace of both nations. The President thinks it more eligible under all circumstances that if no satisfactory or formal stipulation on the subject of impressment be attainable the negotiation should be made to terminate without any formal compact whatever, but with a mutual understanding, founded on friendly and liberal discussions and explanations, that in practice each party will entirely conform to what may be thus informally settled. And you are authorized, in case an arrangement of this kind shall be satisfactory in its substance, to give assurances that as long as it shall be duly respected in practice by the other party more particularly on the subjects of neutral trade and impressment, it will be earnestly, and probably, successfully recommended to Congress by the President not to permit the non-importation act to go into operation. You are also authorized to inform the British Government that the President, adhering to the sentiments which led him to recommend to Congress at the commencement of the Session, a suspension of the act, and trusting to the influence of mutual dispositions and interests in giving an amicable issue to the negotiations, will, if no intervening intelligence forbid, exercise the authority vested in him by the Act, of continuing its suspension from the 1st day of July to the time limited by the Act, and which

will afford to Congress who will then be in Session, the opportunity of making due provision for the case.

You will perceive that this explanation of the views of the President, requires, that if previous to the receipt of it, a Treaty not including an article relating to impressments should have been concluded and be on the way, the British Commissioners should be candidly apprized of the reason for not expecting ratification, and that on this ground they be invited to enter anew on the business, with an eye to such a result as has just been explained and authorized.

Having thus communicated the outline assigned by the President as your guide in the important and delicate task on your hands, I proceed to make a few observations which are suggested by the contents of your last dispatch, and which may be of use in your further discussions and your final arrangements.

IMPRESSMENTS.

The British Government is under an egregious mistake in supposing that "no recent causes of complaint have occurred," on this subject. How far the language of Mr. Lyman's books may countenance this error I cannot say, but I think it probable that even there the means of correcting it may be found. In the American Seas, including the West Indies, the impressments have perhaps at no time been more numerous or vexatious. It is equally a mistake therefore to suppose "that no probable inconvenience can result from the postponement of an Article" for this case.

The remedy proposed in the Note from the British Commissioners, however well intended, does not inspire the confidence here which gave it so much value in their judgment. They see the favorable side only, of the character of their naval Commanders. The spirit which vexes neutrals in their maritime rights, is fully understood by neutrals only. The habits generated by naval command, and the

interest which is felt in the abuse of it, both as respects captures and impressments, render inadequate every provision which does not put an end to all discretionary power in the commanders. As long as the British navy has so complete an ascendency on the high seas, its commanders have not only an interest in violating the rights of neutrals within the limits of neutral patience, especially of those whose commerce and mariners are unguarded by fleets: they feel moreover the strongest temptation, as is well known from the occasional language of some of them, to covet the full range for spoliation opened by a state of War. The rich harvest promised by the commerce of the United States, gives to this cupidity all its force. Whatever general injuries might accrue to their nation, or whatever surplus of reprisals might result to American Cruizers, the fortunes of British Cruizers would not be the less certain in the event of hostilities between the two nations.

Whilst all these considerations require in our behalf the most precise and peremptory security against the propensities of British naval commanders, and, on the tender subject of impressments more than any other, it is impossible to find equivalent or even important motives on the British side for declining a security. The proposition which you have made, aided by the internal regulations which the British Government is always free to make, closes all the considerable avenues through which its seamen can find their way into our service. The only loss consequently which could remain, would be in the number at present in this service; with a deduction of those who might from time to time voluntarily leave it, or be found within the limits of Great Britain or of her possessions; and in the proportion of this reduced number who might otherwise be gained by impressment. The smallness of this loss appears from the annual amount of impressments, which has not exceeded a few hundred British seamen, the great mass consisting of real Americans and of subjects of other neutral powers. And even from the few British

seamen ought to be deducted those impressed within neutral ports, where it is agreed that the proceeding is clearly unlawful.

Under this view of the subject the sacrifice which Great Britain would make dwindles to the merest trifle; or rather, there is just reason to believe that instead of a loss, she would find an actual gain, in the excess of the deserters who would be surrendered by the United States, over the number actually recoverable by impressment.

In practice, therefore Great Britain would make no sacrifice by acceding to our terms; and her principle, if not expressly saved by a recital as it easily might be, would in effect be so by the tenor of the arrangement; inasmuch as she would obtain for her forbearance to exercise what she deems a right, a right to measures on our part which we have a right to refuse. She would consequently merely exchange one right for another. She would also, by such forbearance, violate no personal right of individuals under her protection. The United States on the other hand in yielding to the claims of Great Britain, on this subject, would necessarily surrender what they deem an essential right of their flag and of their Sovereignty, without even acquiring any new right; would violate the right of the individuals under the protection of both; and expose their native Citizens to all the calamitous mistakes voluntary and involuntary, of which experience gives such forcible warning.

I take for granted that you have not failed to make due use of the arrangement concerted by Mr. King with Lord Hawksbury in the year 1802 for settling the question of impressments. On that occasion, and under that administration, the British principle was fairly renounced in favor of the right of our flag; Lord Hawksbury having agreed to prohibit impressments altogether on the High seas; and Lord St. Vincent requiring nothing more than an exception of the narrow seas, an exception resting on the obsolete claim of Great Britain to some peculiar dominion over them. I have thought

it not amiss to inclose another extract from Mr. King's letter giving an account of that transaction.

In the Note of Novr 8th from the British Commissioners, the Security held out to the crews of our vessels is that instructions have been given, and *will be repeated*, for enforcing the greatest caution &c. If the future instructions are to be repetitions of the past, we well know the inefficacy of them. Any instructions which are to answer the purpose, must differ essentially from the past, both in their tenor and their sanctions. In case an informal arrangement should be substituted for a regular stipulation, it may reasonably be expected from the candor of the British Government, that the instructions on which we are to rely, should be communicated to you.

COLONIAL TRADE.

It may reasonably be expected that on this subject the British Government will not persist in attempting to place the United States on a worse footing than Russia. In agreeing to consider the storing for a *month*, and changing the ship, as a naturalization of the property, the concession would be on our side, not on theirs; and in making this a condition on which alone we could trade with enemy Colonies even directly to and from our own ports, beyond the amount of our own consumption, we should make every sacrifice short of a complete abandonment of our principle, while they would retain as much of their pretension as is compatible with any sacrifice whatever, a pretension too, which they have in so many ways fairly precluded themselves from now maintaining. In addition to the many authorities for this remark, already known to you, you will find one of the highest grade in 5th vol. of Tomlin's edition of Brown's cases in Parliament, p. 328—Hendricks and others against Cunningham & others, where it was expressly admitted by the House of Lords, in a war case before them, "it is now estab-

lished by repeated determinations, that neither ships nor cargoes, the property of subjects of neutral powers, either going to trade *at* or coming *from* the French West India Islands, with cargoes purchased there, are liable to capture: and therefore when a ship and cargo so circumstanced are seized and condemned, the seizure and condemnation shall be reversed and the value of the ship and cargo accounted for and paid to the owners by the captors."

As it has generally happened that the British instructions issued to the Vice Admiralty Courts, and naval Commanders have not come first to light in British prints, I inclose one of Novr 14, which has just made its appearance in ours. As it relates to the present subject, it claims attention as a proof that all questions as to the legality of the voyage, in a Russian Trade with the enemies of Great Britain is excluded, by limiting the right of capture to cases where innocence or *ownership* of the *Articles*, are questioned. The instruction may at least be considered as coextensive in its favorable import with the Article in the Russian Treaty, which you have been authorized to admit into your arrangements; and in that view, as well as on account of its date, the instruction may furnish a convenient topic of argument or expostulation.

If the British Government once consent that the United States may make their ports a medium of trade between the Colonies of its enemies and other Countries belligerent as well as neutral, why should there be a wish to clog it with the regulations suggested? Why not in fact consent to a direct trade by our merchants, between those Colonies and all other Countries? Is it that the price may be a little raised on the consumers by the circuit of the voyage, and the charges incident to the port regulations? This cannot be presumed. With respect to the enemies of Great Britain the object would be unimportant. With respect to her neutral friends, it would not be a legitimate object. Must not the answer then be sought in the mere policy of lessening

the competition with, and thereby favoring the price of British and other Colonial productions reexported by British Merchants, from British ports; and sought consequently not in a belligerent right, or even in a policy merely belligerent; but in one which has no origin or plea but those of commercial jealousy and monopoly.

BLOCKADES.

On this subject, it is fortunate that Great Britain has already in a formal communication, admitted the principle for which we contend. It will be only necessary therefore, to hold to the true sense of her own act. The words of the communication are "that vessels must be *warned* not to enter." The term *warn* technically imports a distinction between an individual notice to vessels; and a general notice by proclamation or diplomatic communication; and the terms *not to enter* equally distinguishes a notice at or very near the blockaded port; from a notice directed against the original destination, or the apparent intention of a vessel, nowise approaching such a port.

MARGINAL JURISDICTION ON THE HIGH SEAS.

There could surely be no pretext for allowing less than a marine league from the shore; that being the narrowest allowance found in any authorities on the law of nations. If any nation can fairly claim a greater extent, the United States have pleas which cannot be rejected; and if any nation is more particularly bound by its own example not to contest our claim, Great Britain must be so by the extent of her own claims to jurisdiction on the seas which surround her. It is hoped at least that within the extent of one league you will be able to obtain an effectual prohibition of British ships of War, from repeating the irregularities which have so much vexed our commerce and provoked the public resentment; and against which an Article in your instructions emphatically

provides. It cannot be too earnestly pressed on the British Government, that in applying the remedy copied from regulations heretofore enforced against a violation of the neutral rights of British harbours and Coasts, nothing will be done than what is essential to the preservation of harmony between the two Nations. In no case is the temptation or the facility greater to ships of War, for annoying our commerce than in their hovering on our coasts, and about our harbours; nor is the natural sensibility in any case more justly or more highly excited than by such insults. The communications lately made to Mr. Monroe, with respect to the conduct of British Commanders even within our own waters, will strengthen the claim for such an arrangement on this subject, and for such new orders, from the British Government, as will be satisfactory security against future causes of complaint.

EAST AND WEST INDIA TRADES.

If the West India Trade cannot be put on some such footing as is authorized by your instructions, it will be evidently best, to leave it as it is; and of course, with a freedom to either party to make such regulations as may be justified by those of the other.

With respect to the East India Trade, you will find a very useful light thrown on it, in the remarks of Mr. Crowninshield of which several copies were forwarded in October. They will confirm to you the impolicy, as explained in your instructions admitted into the Treaty of 1794. The general footing of other nations in peace with Great Britain, will be clearly more advantageous; and on this footing it will be well to leave or place it, if no peculiar advantages of which there are intimations in Mr. Crowninshield's remarks, can be obtained.

INDEMNIFICATIONS.

The justice of these ought to be admitted by Great Britain,

whenever the claim is founded on violations of our rights as they may be recognized in any new arrangement or understanding between the parties. But in cases, of which there are many examples, where the claim is supported by principles which she never contested, the British Government ought to have too much respect for its professions and its reputation, to hesitate at concurring in a provision analogous to that heretofore adopted.

It is not satisfactory to allege that in all such cases, redress may be obtained in the ordinary course of judicial proceedings. If this were true, there would be sound policy as well as true equity and economy in transferring the complaints from partial tribunals occupied with a great mass of other cases, to a joint tribunal exclusively charged with this special trust. But it is not true that redress is attainable in the ordinary course of justice, and under the actual constitution and rules of the tribunals which administer it in cases of captures. Of this, the facts within your knowledge and particularly some which have been lately transmitted to Mr. Monroe are ample and striking proofs; and will doubtless derive from the manner of your presenting them, all the force with which they can appeal to the sentiments and principles which ought to guide the policy of an enlightened nation.

I have the honor to be, &c.

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## TO JAMES MONROE.

D. OF S. MSS. INSTR.

DEPARTMENT OF STATE, March 31st, 1807.

SIR,

In my last letter of the 26th inst, I inclosed you a copy of one from Mr. Erskine communicating the British order of Jany 7th and of my answer. Occurring circumstances and further reflection on that extraordinary measure produced a return to the subject, and another letter was

added to the first answer. A copy is enclosed with the same view which led to the last inclosure.

The more this order is examined, the more unjustifiable it appears in its principle, the more comprehensive in its terms, and the more mischeivous in its operation. In the recitals prefacing the measure, as communicated by Mr. Erskine, in the order itself, and in the Note of Lord Howick to you, there is a medley of motives for which a cause must be sought either in the puzzle to find an adequate one, or in the policy of being able to shift from one to another according to the posture which the case may take. Whatever be the explanation, the order, in relation to the United States at least, must ever remain with the candid and intelligent, a violation of those rules of law and of justice which are binding on all nations, and which the greatest nations ought to pride themselves most in honorably observing. Considered as a retaliation on the United States for permitting the injury done to Great Britain thro' their commerce, by the French decree, the order, over and above the objections stated to Mr. Erskine subjects the British Government to a charge of the most striking inconsistency, in first admitting that the decree gave a right to retaliate in the event only of a failure of the United States to controul its operation, as well as that such a failure alone would justify a final refusal of the Treaty signed by its Commissions; and then actually proceeding to retaliate before it was possible for the decision of the United States to be known or even made.

If it be said as is stated that captures had commenced under the decree, the fact would be of little avail. Such occurrences could not have escaped anticipation, nor can the amount of them under the present superiority of British power at sea afford the slightest plea for the extensive and premature retaliation comprized in the order. A Government, valuing its honor and its character, ought to have dreaded less the injury to its interests from the pillage committed by a few cruizers, on neutral commerce, than the reproach or even the suspicion,

that a pretext was eagerly seized for unloosing a spirit, impatient under the restraint of neutral rights, and panting for the spoils of neutral trade. The British Government does not sufficiently reflect on the advantage which such appearances give to her adversary, and the appeal they are both making to the judgment, the interests and the sympathies of the world. If Great Britain wishes to be regarded as the champion of Law, of right and of order among nations, her example must support her pretensions. It must be a contrast to injustice and to obnoxious innovations. She must not turn the indignation of mankind from the violence of which she complains on one element, to scenes more hostile to established principles on the element on which she bears sway. In a word, she ought to recollect, that the good opinion and good will of other nations, and particularly of the United States, is worth far more to her, than all the wealth which her Navy, covering as it does every sea, can plunder from their innocent commerce.

As to the scope of the order, it is evident that its terms comprehend not only the possessions of France and of her allies in Europe; but in every other quarter; and consequently both in the West and in the East Indies. And as to the injury which, if the order be executed as it will be interpreted, by British Cruizers, in the full extent of its meaning, will be brought on the commerce of the United States, an idea may be collected from the glance at it in the letter to Mr. Erskine. The inclosed statement of the amount of our Exports to Europe and of the proportion of them which, not being destined to England may be food for this predatory order, will reduce the estimate to some precision. To make it still more precise however, it will be necessary, on one hand to transfer *from* the proportion cleared for Great Britain, as much as may have touched there only on its way to continental ports; and, on the other, to deduct the inconsiderable destinations to Portugal, the Baltic, and the Austrian ports in the Mediterranean.

Having in your hands the material which this communication will complete, you will be able to make whatever representations to the British Government you may deem expedient, in order to produce a proper revision of the order. If it shall have been finally ascertained that the French Decree will not be applied to the commerce of the United States, you will of course insist on an immediate revocation of the order so far as it may have been applied to that commerce; and if, as in that case the order can no longer be maintained on the principle of retaliation, the pretext of a blockade or of illegality in the trade as a coasting one, be substituted, you will be at no loss for the grounds on which the order is to be combated, and its revocation demanded.

Among the papers accompanying my last was a printed copy of the Proclamation, suspending the Non-importation Act, until December next. This measure of the President under any circumstances, ought to be reviewed as the effect of his amicable policy towards Great Britain. But when it is considered as having been taken with the British order of Jany before him, and a measure subject to the strictures which have been made on it, it is the strongest proof that could be given of his solicitude to smooth the path of negotiation and to secure a happy result to it; and in this light you will be pleased on the proper occasions, to present it.

I have the honor to be, etc.

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## TO JAMES MONROE AND WILLIAM PINKNEY

D. OF S. MSS. INSTR.

DEPARTMENT OF STATE, May 20th 1807.

GENTLEMEN,

My letter of March 18th acknowledged the receipt of your dispatches and of the Treaty signed on the 31 Decr., of which Mr Purviance was the bearer, and signified that the sentiments and views of the President formed on the

actual posture of our affairs with Great Britain, would, without any useless delay, be communicated.[1] The subject is

[1] The treaty as actually presented by Purviance is as follows:

ARTICLE 1st.

[Provides for peace and friendship between the two powers.]

ARTICLE 2d.

It is agreed that the several Articles of the Treaty of Amity, Commerce and Navigation between His Majesty and the United States made at London on the Nineteenth day of November One Thousand Seven Hundred and Ninety Four which have not expired, nor as yet, had their full operation and effect, shall be confirmed in their best form, and in the full tenour; and that the contracting Parties will also from time to time enter into friendly explanations on the subject of the said Articles, for the purpose of removing all such doubts as may arise or have arisen as to the true import of the same, as well as for the purpose of rendering the said Articles more conformable to their mutual wishes and convenience.

ARTICLE 3d.

His Majesty agrees, that the Vessels belonging to the United States of America, and sailing direct from the ports of the said States, shall be admitted and hospitably received in all the Sea Ports and Harbors of the British Dominions in the East Indies; and that the citizens of the said United States may freely carry on a trade between the said territories and the said United States in all articles of which the importation or exportation respectively, to or from the said Territories shall not be entirely prohibited. Provided only that it shall not be lawful for them in any time of war between the British government and any other power or State whatever, to export from the said Territories, without the special permission of the British government there, any Military Stores or Naval Stores or Rice. The Citizens of the United States shall pay for their Vessels, when admitted into the said Ports, no other or higher Tonnage than shall be payable on British Vessels, when admitted into the Ports of the United States. And they shall pay no higher or other Duties or Charges on the Importation or Exportation of the Cargoes of the said Vessels than shall be payable on the same Articles when imported or exported in British Vessels. But it is expressly agreed, that the vessels of the United States shall not carry any of the articles exported by them from the said British

accordingly resumed in this dispatch, with which Mr Purviance will be charged. To render his passage the more sure

Territories to any Port or Place, except to some Port or Place in America, where the same shall be unladen and such Regulations shall be adopted by both Parties as shall, from time to time, be found necessary to enforce the due and faithful observance of this Stipulation.

It is also understood, that the permission granted by this Article is not to extend to allow the vessels of the United States to carry on any part of the Coasting-trade of the said British Territories; but the vessels going out with their original Cargoes or part thereof; from one Port of discharge to another, are not to be considered as carrying on the Coasting trade, neither is this Article to be construed to allow the Citizens of the said States to settle or reside within the said Territories, or to go into the interior parts thereof, without the permission of the British government established there; And if any transgressions should be attempted against the regulations of the British government in this respect, the observance of the same shall and may be enforced against the Citizens of America in the same manner as against British Subjects or others transgressing the same Rule. And the Citizens of the United States, whenever they arrive in any Port or Harbour in the said Territories, or if they should be permitted in manner aforesaid to go to any other State therein, shall always be subject to the Laws, Government and Jurisdiction of whatever Nature, established in such Harbour, Port or Place according as the same may be. The Citizens of the United States may also touch for refreshment at the Island of St. Helena; but subject in all respects to such Regulations as the British government may, from time to time, establish there.

ARTICLE 4th.

There shall be between all the Dominions of His Majesty in Europe and the Territories of the United States a reciprocal and perfect Liberty of Commerce and Navigation. The People and Inhabitants of the two Countries respectively shall have Liberty freely and securely, and without hindrance and molestation, to come with their Ships and Cargoes to the Lands, Countries, Cities, Ports, Places and Rivers, within the Dominions and Territories aforesaid, to enter into the same, to resort there, and to remain and reside there, without any limitation of time; also to hire and possess houses and warehouses for the purposes of their Commerce; and generally, the Merchants and Traders on each side shall enjoy the most compleat protection and

and convenient, he takes it in the sloop of War, Wasp, which will convey him to a British port, on her way to the Mediter-

security for their Commerce, but subject always, as to what respects this Article, to the Laws and Statutes of the two Countries respectively.

ARTICLE 5th.

It is agreed that no other or higher Duties shall be paid by the Ships or Merchandize of the one Party in the Ports of the other, than such as are paid by the like Vessels or Merchandize of all other Nations. Nor shall any other or higher Duty be imposed in one Country on the Importation of any Articles, the Growth, Produce or Manufacture of the other, than are or shall be payable on the Importation of the like Articles, being of the Growth, Produce or Manufacture of any other foreign Country.

Nor shall any Prohibition be imposed on the Exportation or Importation of any Articles to or from the Territories of the two Parties respectively, which shall not equally extend to all other Nations. But the British Government reserves to itself the Right of imposing on American vessels entering into the British Ports in Europe a Tonnage-Duty equal to that which shall at any time be payable by British vessels in the Ports of America; and the Government of the United States reserves to itself a Right of imposing on British Vessels, entering into the Ports of the United States, a Tonnage-Duty equal to that which shall at any time be payable by American Vessels in the British Ports in Europe.

It is agreed that in the Trade of the two Countries with each other, the same Duties of Exportation and Importation on all Goods and Merchandize; and also the same Drawbacks and Bounties shall be paid and allowed in either Country, whether such Importation or Exportation shall be made in British or American Vessels.

ARTICLE 6th.

The High contracting Parties not having been able to arrange at present by Treaty any Commercial Intercourse between the Territories of the United States and His Majesty's Islands and Ports in the West-Indies, Agree that until that subject shall be regulated in a satisfactory manner, each of the Parties shall remain in the complete possession of its Rights in respect to such an Intercourse.

ARTICLE 7th.

It shall be free for the two contracting Parties respectively to

ranean. She will touch also at a French port, probably L'Orient, with dispatches for Genl Armstrong and Mr Bow-

appoint Consuls for the protection of Trade, to reside in the Dominions and Territories aforesaid; And the said Consuls shall enjoy those Liberties and Rights which belong to them by reason of their function. But, before any Consul shall act as such, he shall be in the usual manner approved and admitted by the Party to whom he is sent; And it is hereby declared to be lawful and proper, that in case of illegal or improper conduct towards the Laws or Government, a Consul may either be punished according to Law, if the Laws will reach the Case, or be dismissed, or even sent back, the offended Government assigning to the other the reasons for the same.

Either of the Parties may except from the residence of Consuls, such particular Places as such Party shall judge proper to be excepted.

ARTICLE 8th.

It is agreed, that in all Cases where vessels shall be captured or detained on just suspicion of having on board Enemy's property or of carrying to the Enemy any of the Articles which are Contraband of War, or for other lawful cause, the said Vessel shall be brought to the nearest or most convenient Port; And if any Property of an Enemy should be found on board such Vessel, that part only, which belongs to the Enemy, or is otherwise confiscable, shall be made Prize and the Vessel, unless by Law subject to condemnation, shall be at liberty to proceed with the remainder of the Cargo, without any impediment. And it is agreed, that all proper measures shall be taken to prevent delay, in deciding the cases of Ships or Cargoes so brought in for adjudication; and in the payment or recovery of any indemnification, adjudged or agreed to be paid to the Masters or Owners of such Ships.

It is also agreed, that in all cases of unfounded detention, or other contravention of the Regulations stipulated by the present Treaty, the Owners of the Vessel and Cargo so detained shall be allowed damages proportioned to the loss occasioned thereby, together with the Costs and Charges of the Trial.

ARTICLE 9th.

In order to regulate what is in future to be esteemed contraband of War, it is agreed that under the said denomination shall be comprised all arms and Implements serving for the purposes of War, by Land or by Sea, such as Cannon, Muskets, Mortars, Petards, Bombs, Grenadoes, Carcasses, Saucisses, Carriages for Cannon, Musket-rests,

doin, and will afford a good opportunity for any communications you may have occasion to make to those gentlemen.

Bandoliers, Gunpowder, Match, Salt-petre, Baus, Pikes, Swords, Headpieces, Cuirasses, Halberts, Lances, Javelins, Horse-furniture, Holsters, Belts, and generally all other Implements of War; As also Timber for Ship-building, Copper in Sheets, Sail Cloth, Hemp, and Cordage, and in general [with the exception of unwrought iron and Fir-planks; and also with the exception of Tar and Pitch, when not going to a Port of Naval Equipment, in which case they shall be entitled to pre-emption] whatever may serve directly to the equipment of Vessels; and all the above Articles are hereby declared to be just objects of confiscation, whenever they are to be attempted to be carried to an Enemy. But no Vessel shall be detained on pretence of carrying Contraband of War, unless some of the above mentioned articles, not excepted, are found on board of the said vessel at the time it is searched.

ARTICLE 10th.

Whereas in consideration of the distance, and of other circumstances incident to the situation of the High contracting Parties, it may frequently happen that Vessels may sail for a Port or Place belonging to an Enemy, without knowing that the same is either besieged, blockaded or invested, it is agreed, that every vessel so circumstanced may be turned away from such Port or Place; but she shall not be detained, nor her Cargo, if not Contraband, be confiscated, unless after such notice she shall again attempt to enter: But she shall be permitted to go into any Port or Place she may think proper: Nor shall any vessel or goods of either Party, that may have entered into such Port or Place before the same was besieged, blockaded or invested by the other, and be found therein after the reduction or surrender of such Place, be liable to Confiscation, but shall be restored to the Owners or Proprietors thereof.

Neither of the Parties, when at War, shall, during the continuance of the Treaty, take from on board the Vessels of the other, the subjects of the opposite Belligerent, unless they be in the actual employment of such Belligerent.

ARTICLE 11th.

Whereas differences have arisen concerning the trading with the Colonies of His Majesty's Enemies, and the Instructions given by His Majesty to His Cruizers in regard thereto, it is agreed that during the present Hostilities all Articles of the Growth, Produce and Manufacture

The President has seen in your exertions to accomplish the great objects of your instructions, ample proofs of that zeal

of Europe, not being Contraband of War, may be freely carried from the United States to the Port of any Colony, not blockaded, belonging to His Majesty's Enemies, provided such Goods shall previously have been entered and landed in the United States, and shall have paid the ordinary Duties on such Articles so imported for Home consumption, and on re-exportation shall after the drawbacks remain subject to a Duty equivalent to not less than one per cent ad valorem, and that the said Goods and the vessels conveying the same shall, from the time of their clearance from the American Port, be bonâ fide the property of Citizens and Inhabitants of the United States: And in like manner that all Articles, not being Contraband of War, and being the growth and produce of the Enemy's Colonies, may be brought to the United States, and after having been there landed, may be freely carried from thence to any Port of Europe, not blockaded, provided such Goods shall previously have been entered and landed in the said United States, and shall have paid the ordinary Duties on Colonial articles so imported for Home consumption, and on re-exportation shall, after the drawback, remain subject to a Duty equivalent to not less than Two per Cent ad valorem; And provided that the said Goods and the vessel conveying the same, be bonâ fide the property of Citizens and Inhabitants of the United States.

Provided always, that this Article, or anything therein contained, shall not operate to the prejudice of any Right belonging to either Party; but that after the expiration of the time limited for the Article, the Rights on both sides shall revive and be in full force.

ARTICLE 12th.

And whereas it is expedient to make special provisions respecting the maritime Jurisdiction of the High contracting Parties on the Coasts of their respective possessions in North America on account of peculiar circumstances belonging to those Coasts, it is agreed, that in all Cases where one of the said High contracting Parties shall be engaged in War, and the other shall be at peace, the Belligerent Power shall not stop, except for the purpose hereafter mentioned, the vessels of the Neutral Power, or the unarmed Vessels of other Nations within Five Marine Miles from the shore belonging to the said Neutral Power on the American Seas.

Provided that the said Stipulations shall not take effect in favour of the Ships of any Nation or Nations, which shall not have agreed to

and patriotism in which he confided; and feels deep regret that your success has not corresponded with the reasonableness of your propositions, and the ability with which they were

respect the Limit aforesaid as the Line of Maritime Jurisdiction of the said Neutral State; and it is further stipulated that if either of the High contracting Parties shall be at War with any Nation or Nations which shall not have agreed to respect the said special Limit or Line of Maritime Jurisdiction herein agreed upon, such contracting Party shall have the Right to stop or search beyond the Limit of a Cannon Shot or Three Marine Miles from the said Coasts of the Neutral Power, for the purpose of ascertaining the Nation to which such vessel shall belong: And with respect to Ships and Property of the Nation or Nations not having agreed to respect the aforesaid Line of Jurisdiction, the Belligerent Power shall exercise the same Rights as if this Article did not exist; and the several provisions stipulated by this article shall have full force and effect only during the continuance of the present Treaty.

ARTICLE 13th.

With respect to the searching of Merchant Ships, the Commanders of Ships of War and Privateers shall conduct themselves as favourably as the course of the War then existing may possibly permit towards the most friendly Power that may remain neuter, observing as much as possible the acknowledged Principles and Rules of the Law of Nations: And for the better security of the respective Subjects and Citizens of the contracting Parties, and to prevent their suffering Injuries by the Men of War or Privateers of either Party, all Commanders of Ships of War and Privateers and all others the said Subjects and Citizens shall forbear doing any damage to those of the other Party, or committing any outrage against them; And if they act to the contrary, they shall be punished and shall also be bound in the Persons and Estates to make satisfaction and reparation for all damages, and the Interest thereof, of whatever nature the said damages may be.

For this cause all Commanders of Privateers, before they receive their Commissions, shall hereafter be compelled to give before a competent Judge, sufficient security by at least two responsible Sureties, who have no Interest in the said Privateer, each of whom, together with the said Commander, shall be jointly and severally bound in the Sum of Two Thousand Pounds Sterling; or, if such Ship be provided with above One Hundred and Fifty Seamen, or Soldiers,

supported. He laments more especially, that the British Government has not yielded to the just and cogent considerations which forbid the practice of its Cruizers in visiting and

in the sum of Four Thousand Pounds Sterling, to satisfy all damages and injuries, which the said Privateer, or Officers, or Men, or any of them, may do or commit, during their Cruize, contrary to the tenor of this Treaty, or to the Laws and Instructions for regulating their conduct; and further, that in all cases of aggressions, the said Commissions shall be revoked and annulled.

It is also agreed, that whenever a Judge of a Court of Admiralty of either of the Parties shall pronounce sentence against any Vessel or Goods or Property belonging to the Subjects or Citizens of the other Party, a formal and duly authenticated copy of all the Proceedings in the Cause, and of the said sentence, shall, if required, be delivered to the Commander of the said Vessel, without the smallest delay, he paying all legal Fees and demands for the same.

ARTICLE 14th.

It is further agreed that both the said contracting Parties shall not only refuse to receive any Pirates into any of their Ports, Havens or Towns, or permit any of their Inhabitants to receive, protect, harbour, conceal or assist them in any manner, but will bring to condign punishment all such Inhabitants as shall be guilty of such Acts or offences.

And all their Ships, with the Goods and Merchandize taken by them and brought into the Port of either of the said Parties, shall be seized as far as they can be discovered, and shall be restored to the owners or the Factors or Agents duly deputed, and authorized in writing by them [proper evidence being shewn in the Court of Admiralty for proving the property] even in case such Effects should have passed into other hands by Sale, if it be proved that the Buyers knew, or had good reason to believe, or suspect that they had been piratically taken.

ARTICLE 15th.

It is likewise agreed, that the Subjects and Citizens of the two Nations shall not do any Acts of hostility or violence against each other, nor accept commissions or Instructions so to act from any foreign Prince or State, Enemies to the other Party, nor shall the Enemies of one of the Parties be permitted to invite, or endeavour to enlist in the military Service any of the Subjects or Citizens of the other

impressing the Crews of our vessels, covered by an independent flag, and guarded by the laws of the high seas, which ought to be sacred with all nations.

Party: And the Laws against all such Offences and Aggressions shall be punctually executed; and if any Subject or Citizen of the said Parties respectively shall accept any foreign Commission, or Letters of Marque for arming any Vessel to act as a Privateer against the other Party, it is hereby declared to be lawful for the said Party to treat and punish the said Subject or Citizen, having such Commission or Letters of Marque, as a Pirate.

ARTICLE 16th.

It is expressly stipulated that neither of the said contracting Parties will order or authorize any Acts of reprisal against the other on complaints of injuries and damages until the said Party shall first have presented to the other a statement thereof, verified by competent proof and evidence; and demanded justice and satisfaction, and the same shall either have been refused or unreasonably delayed.

ARTICLE 17th.

The Ships of War of each of the Contracting Parties shall at all times be hospitably received in the Ports of the others, their Officers and Crews paying due respect to the Laws and Government of the Country. The Officers shall be treated with that respect which is due to the Commissions which they bear; and if any Insult should be offered to them by any of the Inhabitants, all Offenders in this respect shall be punished as disturbers of the Peace and Amity between the two Countries. And both contracting Parties agree that in case any Vessel of the one should, by stress of Weather, danger from Enemies or other misfortunes, be reduced to the necessity of seeking shelter in any of the Ports of the other; into which such Vessel could not in ordinary Cases claim to be admitted, she shall, on manifesting that necessity to the satisfaction of the other Government of the Place, be hospitably received and permitted to refit, and to purchase at the market price such necessaries as she may stand in need of, conformably to such Orders and Regulations as the Government of the Place having respect to the circumstances of each Case, shall prescribe. She shall not be allowed to break bulk or unload her Cargo unless the same shall be bonâ fide necessary to her being refitted; nor shall she be obliged to pay any Duties whatever, except

The President continues to regard this subject in the light in which it has been pressed on the justice and friendship

only on such Articles as she may be permitted to sell for the purpose aforesaid.

ARTICLE 18th.

It shall not be lawful for any foreign Privateers (not being Subjects or Citizens of either of the said Parties) who have Commissions from any Power or State in enmity with either Nation, to arm their ships in the Ports of either of the said Parties, nor to sell what they have taken, nor in any manner to exchange the same, nor shall they be allowed to purchase more Provisions than shall be necessary for their going to the nearest Port of that Prince or State from which they obtained their Commissions.

ARTICLE 19th.

It shall be lawful for the Ships of War and Privateers, belonging to the said Parties respectively to carry whither soever they please the Ships and Goods taken from their Enemies, without being obliged to pay any Fees to the Offices of the Admiralty or to any Judges whatever, nor shall the said Prizes when they arrive at and enter the Ports of the said Parties be detained or seized, nor shall the Searchers or other officers of those Places visit such Prizes [except for the purpose of preventing the carrying of any part of the Cargo thereof on shore in any manner contrary to the established Laws of Revenue Navigation or Commerce] nor shall such officers take cognizance of the validity of such Prizes; but they shall be at liberty to hoist sail, and depart as speedily as may be, and carry their said Prizes to the Places mentioned in their Commissions or Patents, which the Commanders of the said Ships of War or Privateers shall be obliged to shew.

No shelter or refuge shall be given in their Ports to such as have made a Prize upon the subjects or Citizens of either of the said Parties; But if forced by stress of weather or the dangers of the Sea to enter them, particular care shall be taken to hasten their departure, and to cause them to retire as soon as possible: Nothing in this Treaty contained, shall however be construed to operate contrary to the former and existing public Treaties with other Sovereigns or States; But the two Parties agree, that while they continue in amity, neither of them will in future make any Treaty that shall be inconsistent with this or the preceding Article.

Neither of the said Parties shall permit the ships or Goods belonging

of Great Britain. He cannot reconcile it with his duty to our sea faring citizens, or with the sensibility or sovereignty

to the Subjects or Citizens of the other to be taken within Cannon shot of the Coast, nor within the Jurisdiction described in Article 12, so long as the Provisions of the said Article shall be in force, by Ships of War or others having Commissions from any Prince, Republic or State whatever: But in case it should so happen, the Party, whose territorial Rights shall thus have been violated, shall use his utmost endeavours to obtain from the offending Party full and ample satisfaction for the Vessel or Vessels so taken, whether the same be Vessels of War or Merchant Vessels.

ARTICLE 20th.

If at any time a rupture should take place (which God forbid) between His Majesty and the United States, the Merchants and others of each of the two Nations, residing in the Dominions of the other, shall have the privilege of remaining and continuing their Trade, so long as they do it peaceably, and commit no offence against the Laws; and in case their conduct should render them suspected, and the respective Governments should think proper to order them to remove, the term of Twelve Months, from the publication of the order, shall be allowed them for the purpose, to remove with their families, effects and property; But this favour shall not be extended to those who shall act contrary to the established laws; and for greater certainty, it is declared that such rupture shall not be deemed to exist, while negotiations for accommodating differences shall be depending, nor until the respective Ambassadors or Ministers if such there shall be, shall be recalled, or sent home on account of such differences, and not on account of personal misconduct, according to the nature and degree of which, both Parties retain their Rights, either to request the recall, or immediately to send home the Ambassador or Minister of the other; and that without prejudice to their mutual friendship and good understanding.

ARTICLE 21st.

It is further agreed that His Majesty and the United States, on mutual requisitions by them respectively, or by their respective Ministers, or Officers, authorized to make the same, will deliver up to Justice all Persons, who being charged with murder or forgery, committed within the Jurisdiction of either, shall seek an asylum within any of the countries of the other, provided that this shall only be done

of the nation, to recognize even constructively, a principle that would expose on the high seas, their liberty, their lives, every thing in a word that is dearest to the human heart, to the

on such evidence of criminality, as, according to the Laws of the Place, where the Fugitive or Person so charged shall be found, would justify his apprehension and commitment for trial, if the offence had there been committed. The expense of such apprehension and delivery shall be borne and defrayed by those who make the requisition and receive the Fugitive.

ARTICLE 22d.

In the event of a Shipwreck happening in a Place belonging to one or other of the High contracting Parties, not only every assistance shall be given to the unfortunate Persons, and no violence done to them, but also the effects which they shall have thrown out of the Ship into Sea, shall not be concealed or detained, nor damaged under any pretext whatever; on the contrary the above mentioned effects and Merchandize shall be preserved, and restored to them upon a suitable recompense being given to those who shall have assisted in saving their Persons, Vessels and Effects.

ARTICLE 23d.

And it being the intention of the High contracting Parties, that the People of their respective Dominions shall continue to be on the footing of the most favoured Nation, it is agreed, that in case either Party shall hereafter, grant any additional advantages, in Navigation, or Trade, to any other Nation, the Subjects or Citizens of the other Party shall fully participate therein.

ARTICLE 24th.

The High Contracting Parties engage to communicate to each other, without delay, all such Laws as have been or shall be hereafter enacted by their respective Legislatures, as also all Measures which shall have been taken for the abolition or limitation of the African Slave Trade; and they further agree to use their best endeavours to procure the co-operation of other Powers for the final and complete abolition of a Trade so repugnant to the principles of Justice and Humanity.

capricious or interested sentences which may be pronounced against their allegiance, by officers of a foreign Government, whom neither the law of nations, nor even the laws of that Government will allow to decide in the ownership or character of the minutest article of property found in a like situation.

It has a great and necessary weight also with the President, that the views of Congress, as manifested during the Session which passed the non-importation Act, as well as the primary rank held by the object of securing American Crews against British impressment, among the objects which suggested the solemnity of an Extraordinary Mission, are opposed to any Conventional arrangement, which, without effectually providing for that object, would disarm the United States of the means deemed most eligible as an eventual remedy.

It is considered moreover by the President the more reasonable that the necessary concession in this case should be made by Great Britain, rather than by the United States, on the double consideration; first, that a concession on our part would violate both a moral and political duty of the Government to our Citizens; which would not be the case on the other side; secondly that a greater number of American Citizens than of British subjects are, in fact, impressed from our

ARTICLE 25th.

And it is further agreed that nothing herein contained shall contravene or effect the due execution of any Treaty or Treaties now actually subsisting between either of the High Contracting Parties and any other Power or Powers.

ARTICLE 26th.

This Treaty when the same shall have been ratified by His Majesty and by the President of the United States, with the advice of their Senate, and the respective Ratifications mutually exchanged, shall be binding and obligatory on His Majesty and on the said States for Ten Years, from the date of the exchange of the said Ratification and shall be reciprocally executed and observed with punctuality and the most sincere regard to good faith.

[Done December 31, 1806.] *Dept. of State MS. Despatches.*

vessels; and that, consequently, more of wrong is done to the United States, than of right to Great Britain; taking even her own claim for the legal criterion.

On these grounds, the President is constrained to decline any arrangement, formal or informal, which does not comprize a provision against impressments from American vessels on the high seas, and which would, notwithstanding be a bar to legislative measures, such as Congress have thought, or may think proper, to adopt for controuling that species of aggression.

Persevering at the same time in his earnest desire to establish the harmony of the two nations on a proper foundation, and calculating on the motives which must be equally felt by Great Britain to secure that important object, it is his intention that your efforts should be revived, with a view to such alterations of the instrument signed on the 31st Decr, as render it acceptable to the United States.

That you may the more fully understand his impressions and purposes, I will explain the alterations which are to be regarded as essential; and proceed then to such observations on the several Articles, as will shew the other alterations which are to be attempted, and the degree of importance respectively attached to them.

1st. Without a provision against impressments, substantially such as is contemplated in your original instructions, no Treaty is to be concluded.

2d. The eleventh Article on the subject of Colonial trade cannot be admitted, unless freed from the conditions which restrict to the market of Europe, the reexportation of Colonial produce, and to European Articles, the supplies to the Colonial market.

3d. The change made by the 3d Article in the provisions of the Treaty of 1794, relative to the trade with the British possessions in India, by limiting the privilege to a direct trade *from* the United States, as well as *to* them, is deemed an insuperable objection.

4th. Either an express provision is to be insisted on for indemnifying sufferers from wrongful captures, or at least a saving, in some form or other, of their rights against any implied abandonment.

5th. Article 18 and 19 to be so altered as to leave the United States free as a neutral nation to keep and place other belligerent nations on an equality with Great Britain.

6th. Such an alternative as is presented by the declaratory note on the subject of the French decree of Novr 21–1806 will be admissible.

First. The considerations which render a provision on the subject of impressments indispensable, have been already sufficiently explained.

Second. The essential importance of the amendment required in the 11th article, results from the extensive effect which the article, if unamended, would have on the system of our commerce as hitherto carried on, with the sanction or acquiescence of Great Britain herself.

It was hoped that the British Government in regulating the subject of this article, would at least have yielded to the example of its Treaty with Russia. It could not have been supposed, that a modification would be insisted on, which shuts to our neutral commerce important channels, left open by the adjudications of British Courts, and particularly by the principle officially communicated by that Government to this, thro' Mr King in the year 1801.

According to that principle and those adjudications, the indirect trade thro' our neutral ports was as free from enemy Colonies to every other part of the world, as to Europe; and as free to such Colonies, in the Articles of all other Countries, as in European Articles.

According to the tenor of the Article, and the general prohibitory principle assumed by Great Britain, to which it has an implied reference, the productions both of the Continental and of the insular Colonies in America, can no longer be re-exported as heretofore to any part of Asia or Africa,

or *even* of America; and consequently can no longer enter into the trades carried on, from the United States, to the Asiatic and African shores of the Mediterranean; nor to any of the places, beyond the cape of Good Hope offering a market for them; nor finally to any other enemy or neutral Colonies in this quarter, to which in reason, as well as according to practice, they ought to be as re-exportable, as to the Countries in Europe to which such Colonies belong.

In like manner the importations from beyond the Cape of Good Hope, more especially the cotton fabrics of China and India, can no longer be sent, as heretofore, to the West Indies, or the Spanish Main, where they not only now yield a great profit to our merchants, but being mixed in cargoes with the produce of this Country, facilitate and encourage the trade in the latter. Besides the effect of the Article in abridging so materially our valuable commerce, the distinction which it introduces between the manufactures of Europe and those of China and India, is charged with evils of another sort. In many cases it might not be easy to pronounce on the real origin of the Articles. It is not improbable that supposititious attempts also might be occasionally made, by the least scrupulous traders. With such pretexts as these, arguing from the abuse made of less plausible ones, the interruptions and vexations of our trade, by the greedy cruizers which swarm on the ocean, could not fail to be augmented in a degree, not a little enforcing the objection to the article in its present form.

As the prohibitory principle of Great Britain does not extend to the case of a Colonial Trade usually open, and no judicial decision has professedly applied the principle to such a trade, it is a reasonable inference, that the Article will be so construed as to interfere with the trade of that description, between enemy Colonies beyond the Cape of Good Hope, and other Countries and ports, in that quarter. But on the other hand, it may not be amiss to guard against a construction of the Article that would abolish the rule observed in

the prize Courts of Great Britain, which, in the case of the Eastern Colonies, presumes that these ports were always open, and thereby throws on the captors, instead of the claimants, the disadvantage of proving the fact in question.

It is observable that the duration of this article is limited to the period of the present hostilities, whilst the others are to be in force for ten years; so that if there should be a peace and a renewal of the war, as is very possible, within the latter period, the onerous parts of the bargain would survive a part, in consideration of which, they were assumed. Justice and reciprocity evidently require that the more important articles of the Treaty should be regarded as conditions of each other, and therefore that they should be co-durable. In this point of view, you will bring the subject under reconsideration; and without making this particular amendment an ultimatum, press it with all the force which it merits. This amendment ought to be the less resisted on the British side, as it would still leave to that side, an advantage resulting from the nature of the two great objects to be attained by the United States, namely, the immunity of our crews, and of our neutral commerce, which are connected with a state of war only; whereas the stipulations, valued by Great Britain, will operate constantly throughout the period of the Treaty, as well in a state of peace, as in a state of war.

Whatever term may finally be settled for the continuance of the regulation, it will be proper to retain the clause which saves the right involved in the article, from any constructive abandonment or abridgement. Even the temporary modification of the right, as it will stand without the inadmissible restrictions now in the article, is considered as an important sacrifice on the part of the United States to their desire of friendly adjustment with Great Britain. To an admission of the Article with those restrictions, the President prefers the footing promised to the Colonial trade, by the deference of Great Britain for the maritime powers, and by an un-

fettered right of the United States to adapt their regulations to the course which her policy may take.

That the operations of the Article in its present form, might be more fully understood, it was thought proper to avail the public of the ideas of a citizen of great intelligence and experience with respect to a valuable elucidation of the subject. They will suggest, at the same time, some explanatory precautions worthy of attention; particularly in the case of Articles, which paying no duty on importation into the United States, do not fall under the regulation of drawbacks; and in the case of securing by bond, instead of actually paying, the duties allowed to be drawn back. It appears by the observations in your letter of Jany 3d that the bond was understood, as it surely ought to be, equivalent to actual payment. But this is a point so material, that it cannot be too explicitly guarded against the misinterpretation of interested Cruizers, and the ignorance or perverseness of inferior Courts.

3. The necessity of the change required in the third article, in order to secure an indirect, as well as a direct trade to the British East Indies, will be fully explained by the observations which have been obtained from several of our best informed Citizens on that subject, and which are herewith inclosed.

As the latitude of intercourse was stipulated by the 13th Art of the Treaty of 1794, as judicially expounded by British superior Courts; as it was enjoyed by the United States prior to that epoch, and has been always enjoyed, both before and since by other friendly nations; and as there is reason to believe that the British Government has been at all times ready since the Article expired, to renew it in its original form; it may justly be expected that the inserted innovation will not be insisted on. Should the expectation fail, the course preferred is to drop the article altogether, leaving the trade on the general footing of the most favored nation, or even trusting to the interest of Great Britain for such regulation as may correspond with that of the United States.

Should the negotiation take up the East India Article of the Treaty of 1794, you will find several amendments suggested in the extracts above referred to, some of which may be attempted with the greater chance of success, as they are harmless, if not favorable, to the British system. To these suggestions may be added a privilege to American vessels, of touching at the Cape of Good Hope. The objection to such a stipulation, under the present defeasible title of Great Britain to the Cape, may be obviated by a descriptive provision, not necessarily applicable to it, in the event of its restitution by a Treaty of peace, but embracing it, in case the British title should be established by that event: It may be agreed "that vessels of the United States may touch for refreshment at all the ports and places in the possession of Great Britain on or in the African or Asiatic seas."

4. Without a provision, or a reservation, as to the claims of indemnity, an abandonment of them may be inferred from a Treaty as being a final settlement of existing controversies. It cannot be presumed that a precaution against such an inference, in any mode that may be most effectual, can be opposed or complained of. On the contrary it excites just surprise that so much resistance should be made to indemnifications supported by the clearest rules of right, and by a precedent in a former Treaty between the two Countries, from which so many other Articles have been copied. The only colorable plea for refusing the desired provision, flows from a presumption not only that the British Courts are disposed, but that they are competent, to the purpose of complete redress. Not to repeat observations heretofore made on this subject, an unanswerable one is suggested by the clause in the Article of the Treaty annulling the principle, or rather the pretence, that vessels without contraband of war on board, returning from a port to which they had carried articles of that sort, were subject to capture and condemnation. Previous even to this recognition, it had been settled as the law of Nations by the British High Court of Admiralty, that

vessels so circumstanced were exempt from interruption. Yet a British order of August 1803 expressly declares them to be lawful prize; and it is well known that a number of American vessels have been seized and condemned under that order. Here then is a class of wrongs, undeniably entitled to redress, and which neither can nor ever could possibly be redressed, in the ordinary course; it being an avowed rule with the prize Courts to follow such orders of the Government, as either expounding or superseding the law of nations. Even cases not finally decided, would probably be considered as falling under the rule existing at the time of the capture, and consequently be added to this catalogue of acknowledged, but unredressed injuries.

5. Articles 18 & 19—An effect of these Articles is to secure to British Cruizers and their prizes, a treatment in American ports, more favorable, than will be permitted to those of an enemy, with a saving of contrary stipulations already made, and a prohibition of any such in future. As none of our Treaties with the belligerent Nations (France excepted) stipulate to the Cruizers an equality in this respect, and as there are parties to the War, with whom we have no Treaties, it follows that a discrimination is made in the midst of war between the belligerent nations, which it will not be in the power of the United States to redress.

Weighty considerations would disuade from such a deviation from a strict equality towards belligerent nations, if stipulated at a time least liable to objection. But it would be difficult to justify a stipulation, in the midst of war, substituting for an existing equality, an advantage to one of the belligerent parties over its adversaries; and that too, without any compensation to the neutrals, shielding its motive from the appearance of mere partiality. Hitherto the United States have avoided as much as possible such embarrassments; and with this view have gratuitously extended to all belligerents the privileges stipulated to any of them. Great Britain has had the benefit of this scrupulous policy. She can

therefore with less reason expect it to be relinquished for her benefit.

The last paragraph of the 19th Art, establishes a just principle as to the responsibility of a neutral nation whose territory has been violated by captures within the limits; but by extending the principle to the two miles added to our jurisdiction by the 12th art, qualified as that addition is, it is made peculiarly important that an amendment should take place.

Passing by the failure of a reciprocity, either in the terms or the probable operation of the responsibility, the United States seem to be bound to claim from the enemies of Great Britain, redress for a hostile act, which such enemies may not have renounced their right to commit within the given space; making thus the United States liable to the one party, without a correspondent liability to them in the other party; and at the same time entitling Great Britain to redress for acts committed by her enemies, which she has reserved to herself a right to commit against them.

Should all the other belligerent nations contrary to probability, concur, in the addition of two miles to our jurisdiction this construction would still be applicable to their armed ships; those unarmed alone being within the additional immunity against British Cruizers; and the armed as well as the unarmed ships of Great Britain, being expressly within the additional responsibility of the United States.

6. No Treaty can be sanctioned by the United States, under the alternative presented by the declaratory note on the subject of the French decree of Novr 21st. It is hoped that the occasion which produced it will have vanished, and that it will not be renewed in connection with a future signature on the part of Great Britain. The utmost allowable in such a case would be a candid declaration that in signing or ratifying the Treaty, it was understood on the part of Great Britain, that nothing therein contained would be a bar to any measures, which if no such Treaty existed, would be lawful as a retalia-

tion against the measures of an enemy. And with such a declaration, it would be proper, on the part of the United States, to combine an equivalent protest against its being understood, that either the Treaty or the British declaration would derogate from any rights or immunities, against the effect of such retaliating measures, which would lawfully appertain to them, as a neutral nation, in case no such Treaty or declaration existed.

Having given this view of the alterations which are to be held essential, I proceed to notice such others as, tho' not included in the ultimatum, are to be regarded as more or less deserving your best exertions. This will be most conveniently done, by a review of the several Articles in their numerical order.

The 2, 4 & 5 all relate to the trade and navigation between the two Countries. The two first make no change in the stipulations of the Treaty of 1794. The last has changed, and much for the better, the provisions of that Treaty, on the subject of tonnage and navigation.

Two important questions however, enter into an estimate of these articles.

The first is whether they are to be understood as a bar to any regulations, such as navigation Acts, which would merely establish a reciprocity with British regulations. From the construction which seems to have always [been] put on the same stipulations in the Treaty of 1794, it is concluded that no such bar could be created, and consequently that the Articles are in that respect unexceptionable. It may be well, nevertheless, to ascertain that the subject is viewed in this light by the British Government.

The second question is, whether the parties be, or be not, mutually restrained from laying *duties*, as well as prohibitions, unfavorably discriminating between Articles exported to them, and like articles exported, to other nations.

According to the construction put by the United States on the same clauses in the Treaty of 1794, the mutual restraint

was applicable to discriminations of both kinds. The British discriminating duties on exports, introduced under the name of Convoy duties and since continued and augmented under other names, were accordingly combated, during the existence of the Treaty, as infractions of its text. The British Government however, never yielded to our construction either in discussion or in practice. And it appears from what passed in your negotiations on this subject, that the construction which is to prevail, admits discriminating duties on exports.

In this point of view, the stipulation merits very serious attention. It cannot be regarded as either reciprocal or fair in principle, or, as just and friendly in practice.

In the case of prohibitions, where both Governments are on an equal footing, because it is understood that both have the authority to impose them, neither is left at liberty to exercise the authority.

In the case of duties, where the British Government possesses the authority to impose them, but where it is well known that the authority is withheld from the Government of the United States by their Constitution, the Articles are silent; and of course the British Government is left free to impose discriminating duties on their exports, whilst no such duties can be imposed by that of the United States. How will it be in practice? Stating the exports of Great Britain to the United States at 6 millions sterling only, the present duty of 4 pCt levies a tax on the United States amounting to 240 thousand pounds, or One million, Sixty five thousand Six hundred dollars; and there is nothing, whilst the War in Europe checks competition there, and whilst obvious causes must for a long time enfeeble it here, that can secure us against further augmentations of the tribute.

Even under a regulation placing the United States on the footing of the most favored nation, it appears that the British Government would draw into its Treasury from our consumption 3/8 of the revenue now paid by the United

States. Such a footing, however, would be material, as giving the United States the benefits of the Check accruing from the more manufacturing State of the European Nations. But to be deprived of that check by the Want of an Article, putting us on the footing of the Nations most favored by Great Britain, and at the same time deprived of our own checks, by clauses putting Great Britain on the Commercial footing of the nations most favored by the United States, would, in effect, confirm a foreign authority to tax the people of the United States, without the chance of reciprocity or redress.

The British duty on exports to the United States has another effect, not entirely to be disregarded. It proportionally augments the price of British manufactures, re-exported from the United States to other markets, and so far promotes a direct supply from Great Britain, by her own merchants and ships. Should this not be the effect of her regulations as now framed, there is nothing that would forbid a change of them, having that for its object.

On these considerations it is enjoined upon you by the President to press in the strongest terms, such an explanation or amendment of this part of the Treaty, as will, if possible restrain Great Britain altogether from taxing exports to the United States, or at least place them on the footing of the most favored nation; or if neither be attainable, such a change in the instrument in other respects, as will reserve to the United States the right to discriminate between Great Britain and other nations in their *prohibition* of exports, the only discrimination in the case of exports, permitted by the Constitution. The unwillingness of the President to risk an entire failure of the projected accommodation with Great Britain restrains him from making an Amendment of this part of the Treaty a sine qua non; but he considers it so reasonable, and so much called for by the opinions and feelings of this Country, that he is equally anxious and confident with respect to a compliance on the part of the British Government.

ART. 6.

This article as taking the case of the West India trade out of any general stipulation of privileges granted to other nations, may prove convenient, by disincumbering measures which may be taken against the British monopoly, from questions of which that stipulation might otherwise be susceptible.

Art. 7, tho' to remain if desired, would be more reasonable without the last paragraph, or with a right only to except places and periods, at which the trade of the other party may not be permitted.

ART. 8.

This article is framed with more accuracy than the 17th on the same subject in the Treaty of 1794, and is improved by the additional paragraph at the close of it. But as such general stipulations have not been found of much avail in practice, and as it continued to be the wish of the President to avoid, especially at the present juncture, unnecessary confirmations of the principle that a neutral flag does not protect enemies property, an omission of the Article is much preferred, unless it be so varied as to be free from the objection. This may be easily done, by substituting a general stipulation, "that in all cases where vessels shall be captured or detained for any lawful cause, they shall be brought to the nearest or most convenient port; and such part only of the Articles on board as are confiscable by the law of nations shall be made prize; and the vessel, unless by that law subject also to confiscation, shall be at liberty to proceed &c."

There ought to be the less hesitation on the British side in making this change, as the Article in its present form departs from that of 1794; and there is the more reason on our side for requiring the change, as the addition of "for other lawful cause" after specifying the two cases of the enemy's property and contraband of War, is probably valued by Great Britain as supporting her doctrine, and impairing ours,

with respect to Colonial trade. The only case other than those specified, to which the right of capture is applicable, is that of blockades, which might have been as easily specified, as provided for by such a residuary phrase; and the pretext for appropriating this phrase to the case of the Colonial trade would be strengthened by the specific provision, in a subsequent article for the case of blockades.

It cannot be alleged that the specifications of the two cases, of enemy's property and contraband of war, are necessary to prevent uncertainty and controversy; the United States having sufficiently manifested their acquiescence in these causes of capture. If there be a source of uncertainty and controversy, it is in the expressions "*other* lawful cause" and "*otherwise* confiscable" and this source could not be increased by the change here proposed.

ART. 9.

This article is an improvement of that on the same subject in the Treaty of 1794; inasmuch as it excepts from the list of contraband, tar and pitch, when not bound to a port of naval equipment, and when so bound, substitutes preemption for forfeiture. It has an advantage also, in the clause renouncing the principle of the British order of Augt 1803 against vessels returning from the places, to which they had carried contraband of War.

On the other hand, it would not have been unreasonable to expect that the British Government would, in a Treaty with the United States, have insisted on no stipulation less favorable, than her stipulation on the same subject, with Russia, especially as the Naval stores exported from the United States, are equally the growth and produce of the Country.

Consistency again, as well as reason evidently required, that the exception in favor of tar and pitch should have been extended to every species of naval stores, equally applicable to other uses than those of War, and destined to places other than those of naval equipment.

Lastly it is observable, that even turpentine and rosin are not included with Tar and pitch in the favorable exceptions, tho' of a character so kindred as to leave no pretext for the distinction.

Neither has the British Government the slightest ground for regarding as a concession, the stipulated immunity of a vessel, which, on her outward voyage, had carried contraband to a hostile port. The principle asserted by her order on that subject is an innovation against the clearest right of neutrals as recognized and enforced even by British Courts. The very language of the Article implies that this is a *pretence* for the innovation.

These considerations urge a remodification of the Article, and they are strengthened by the great dislike of the President to formal regulations at this particular moment, of principles combated by some, and unfavorable to all neutral nations. So ineligible indeed, in his view, is any step tending in the least to retard the progress of these principles, that naval stores are to be left on a stipulated list of contraband, in the event only of an inflexible refusal of the British Government to omit them; nor are they to be retained in any event, without an addition or explanation that will except turpentine and Rosin, as well as tar and pitch, there being no plausible motive for the distinction; and the quantity and value of the two former exported from the United States, being found, on enquiry, to make them of equal importance with the two latter. It can scarcely be supposed that the British Government will insist on this unwarrantable distinction. It is not indeed improbable, that it has been a mere inadvertence. Such an inference is favored by the circumstance of your speaking, in your comment on this article, of Tar and *Turpentine*, as being the two exceptions. Whatever the true state of the case may be, it is thought better to omit a list of contraband altogether, than not to include in the exception from it Turpentine and Rosin, as well as tar and pitch.

ART. 10.

The abuse of Blockades has been so extravagant and has produced so much vexation and injury to the fair commerce of the United States, that, as on one hand it is of great importance to find a remedy; so, on the other, it is the more necessary, that the remedy should be such as not itself, to admit of abuse. The considerations which reconciled you to the tenor of the Article, as at least a constructive approach to a solid provision for the case, are allowed the weight which they justly merit; whilst the course which your discussions took, are a proof of the exertions which were used to give the Article a more satisfactory form.

The failure however of the British Commissioners to substantiate a favorable construction of the Article, by a proper explanatory letter addressed to you, with their reasons for refusing to insert in the Treaty a definition of blockade, justify apprehensions that the vague terms, which alone were permitted to compose the Article, would be more likely to be turned against our object, by Courts and Cruizers, and perhaps by a less liberal Cabinet, than to receive in practice the more favorable construction which candor anticipated.

The British doctrine of blockades exemplified by practice, is different from that of all other nations, as well as from the reason and nature of that operation of War. The mode of notifying a blockade by proclamations and diplomatic communications, of what too is to be done, is more particularly the evil which is to be corrected. Against these nominal blockades, the Article does not sufficiently close the door. The preamble itself, which refers to distance of situation, as a frequent cause of not knowing that a blockade exists, tho' in one view giving the United States the advantage of a favorable presumption, in another view, carries an admission unfavorable to our principle, which rests not on the distance of situation, but on the nature of the case, and which consequently rejects, in *all* cases the legal sufficiency of notifications

in the British mode. The preamble is liable to the remark also that it separates our cause from the common one of neutral nations in a less distant situation, and that the principle of it, may even be pleaded against us in the case of blockades in the West Indies. These considerations would have been outweighed by the advantage of establishing a satisfactory rule on the subject, in favor of our trade; but without such a provision in the article, it is thought less advisable to retain it, than to trust to the law of blockades as laid down by all writers of authority, as supported by all treaties which define it, and more especially as recognized and communicated to the United States by the British Government thro' its Minister here in last; not to mention the influence, which the course of events, and the sentiments of the Maritime Nations in friendship with Great Britain may have in producing a reform on this subject.

The last paragraph tho' subjecting persons in Civil as well as military service of an enemy, to capture, in our vessels, may prove a valuable safeguard to ordinary passengers and Mariners, against the wrongs which they now frequently experience, and which affect the vessels as well as themselves.

ART. 12.

It is much regretted that a provision could not be obtained against the practice of British Cruizers, in hovering and taking Stations for the purpose of surprizing the trade going in and out of our harbours; a practice which the British Government felt to be so injurious to the dignity and rights of that nation at periods when it was neutral. An addition of two miles nevertheless, to our maritime jurisdiction, so far as to protect neutral and other unarmed vessels, notwithstanding its want of anything like a due reciprocity, is not without its value. This value will at the same time be very materially impaired if the stipulation cannot be liberated from the clause requiring the consent of the other belligerent Nations, as necessary to exempt their vessels from search

and seizure. None of the other belligerent nations have in fact unarmed vessels engaged in our trade, nor are they likely to have any during the war; and these alone could derive advantage from their consent; their armed vessels being expressly excepted. There can be no motive with them therefore, to agree to the regulation. They would rather be tempted to embarrass it, with a view to continue as much as possible vexations which lessen the mutual good will of the parties. And as by their not agreeing to the regulations, the right is reserved to British Cruizers to examine all vessels for the purpose of ascertaining whether they may not belong to a belligerent, the disturbance of our trade might be little diminished within the additional two Miles. Besides the mere interruption of a search concerning the vessel, it is hardly to be expected from the general spirit of Cruizers, that the search will not be extended to the Cargo, and if the latter should be thus or otherwise found or suspected to be of a confiscable sort that the temptation to capture would be resisted; the less so perhaps, as the increased distance from the shore, and the increased difficulty of proof would favor the chance of condemnation, or at least countenance Courts in their propensity to refuse damages and Costs to the claimants.

To secure the advantage promised by this Article, the right of search ought to be suppressed altogether; the additional space enjoying in this respect the same immunity as is allowed to the marine league. To this object the President wishes your endeavours to be directed.

I reserve for the 19th Art. another view of the subject which will claim your attention.

ART. 13.

The general provision here copied from the Treaty of 1794, tho' not hitherto found of much effect, in controuling the licenciousness of Cruizers, and very different from the special rules in favor of neutrals contained in most treaties which touch the subject of search, enters very properly into

a comprehensive arrangement between two friendly nations. The introductory sentence alone, which consists of new matter invites particular notice. The expressions "*as the course of the war may possibly permit*" and "observing *as much as possible* the acknowledged principles and rules of the law of nations" however favorably *intended* by the British Negotiators, will not improbably be construed into a relaxation of the neutral right in favor of belligerent pleas, drawn from circumstances of which belligerent Agents will be the Judges. The expressions may easily be so varied as to refer simply to the law of nations for the rule, and to the friendship of the parties, for the spirit, according to which the search is to be conducted. If such an Amendment should be deliberately rejected by the British Government, it will be a proof of lurking danger, that will recommend an omission of what relates to the subject of search in preference to retaining it.

Arts. 14, 15 & 16 call for no particular observation.

ART. 17.

So much of the Article as relates to the admission of ships of war, would be advantageously exchanged for a general stipulation, allowing on this subject the privilege granted to the most favored nation. It would then be in the power of the United States to limit the number admissible at one time; whereas such an indefinite admission of British ships imposes on our neutrality a like indulgence to the fleets of other nations. Such an alteration of the article is the more reasonable and important, as there will be little reciprocity in its operation, the United States having but few ships; and the inconveniences from British ships in our ports being much greater than those from our ships in British ports.

The engagement to treat officers of the Navy with respect, is not only too indefinite to be enforced by penal regulations, but implies a reproachful defect of hospitality and civility. In this light it was viewed during the discussions of the Treaty of 1794. The clause probably grew then out of re-

cent complaints, well or ill founded, of disrespectful conduct on some occasion towards British officers. If latter occurrences were to be consulted, it would be a more apt provision now, to stipulate for the punishment of naval commanders making insulting and ungrateful returns for the kindness and respect shown them in our ports and towns. The President makes almost a point of excluding this part of the Article.

Arts. 18 & 19 already noticed.

ART: 20.

Considering the great number of British merchants residing in the United States, with the great means of influence possessed by them, and the very few American Merchants who reside in Great Britain, the inconvenience which may be incident to such a protracted right to remain during a state of war, is evidently much greater on our side than on the other. In this view the stipulation is very unequal. The liberal spirit of it is, at the same time, highly commendable. It were only to be wished that the readiness of one side to make sacrifices of this sort, to a spirit which ought to pervade every part of a Treaty between the parties, had been less met by an apparent disposition on the other side, rather to extort from than to emulate it.

Art: 21. Not agreeable, but not to be an insuperable obstacle.

Art: 22 is altogether proper.

ART: 23.

This Article granting the privileges of the most favored nation, seems to require explanation if not alteration. The terms "shall *continue* to be on the footing of the most favored nation," implies that the parties are now on that footing. To look no further, the discrimination between Export from Great Britain to Europe and to the United States is a proof that the fact is otherwise.

But may not the expression be construed into a barrier against the laws on the part of the United States, establishing a reciprocity with the British navigation Act and West India regulations. It might be impolitic to extend such laws to all other nations, as it would be just to extend them to such as had not adopted the restrictive system of Great Britain. And yet a discrimination might be arraigned as not *continuing* Great Britain in the same footing with other Nations.

The object of this Article, so far as it is a legitimate one, would be sufficiently provided for by a mutual stipulation of the privileges in trade and navigation enjoyed by the most favored nation; and such stipulations moreover ought in justice to import or imply, that where privileges are granted to a third Nation in consideration of privileges received, the privileges cannot be claimed under the stipulation, without a return of the same or of equivalent privileges. The condition is certainly not without difficulties in the execution, but it avoids a greater evil. Should Spain or France open her Colonies to our ships and productions, on our granting certain privileges to her trade, these could not be claimed or expected by the most friendly nation who would not pay the price of them.

Arts: 24 & 25 are entirely proper.

ART: 26.

It is particularly desirable that the duration of the Treaty should be abridged, to the term limited in the instructions of the 5th Jany 1804.

Having taken this view of the subject with reference to a formal Treaty under new modifications, it is necessary to recollect that you were authorized by my letter of Feby 3d, to enter into informal arrangements and that before the receipt of my letter of March 18th a plan of that sort may have been definitively settled. In such a state of things, it is impossible to do better than to leave your own judgments, aided by a knowledge of circumstances unknown here, and by the senti-

ments of the President now communicated, to decide how far it may be eligible, or otherwise, to attempt to supersede that informal arrangement, by opening the negotiation herein contemplated.

Should, on another hand, the negotiation be found in the state authorized by my letter of March 18th, that is to say, matured provisionally only, and consequently leaving the door open for the experiment now provided for, it must equally remain with your own judgments, guided by a comparison of the terms of the provisional arrangement, with the present instructions, to decide how far it may be best to close the former, or to pursue the objects of the latter with a view in case of failure, to return to and close the former.

Whatever may be the course recommended by the actual state of things, you will feel the propriety of smoothing the way for it, by the explanations which will best satisfy the British Government that the several steps taken on the part of the United States have proceeded from their solicitude to find some ground on which the difficulties and differences existing between the two Countries, might be amicably and permanently terminated. You will be equally aware of the importance of transmitting hither as early and as circumstantial information of your proceedings and prospects, as opportunities will permit; and will particularly keep in mind the earnest desire of the President to possess, in due time, every material preparatory to the Communications relating to our affairs with Great Britain, which will be so anxiously expected on the meeting of Congress the first Monday in December.

Since the contents of this Dispatch were determined on, and mostly prepared, advices have been received of the change which is taking place in the British administration. Composed as the new one is likely to be, or rather is said to be the event will subject our British affairs to new calculations. The difference in the general complexion ascribed to the politics of the rival parties towards the United States and the

language held by some individuals of the one now entering the Cabinet, augur, on one hand, fresh obstacles to a favorable negotiation. On the other hand, however, a less degree of confidence in their own strength than was felt by their predecessors, and a dread of furnishing these with such a topic as might be found in a real or impending collision with this Country, may be a powerful controul on illiberal dispositions towards it. Another favorable consideration is, that an important member of the New Ministry, Lord Hawksbury, was formerly as the head of the foreign Department, the person who negotiated with Mr. King a relinquishment of impressments on the high seas, who made to the same public minister, the Communications assuring to neutrals a re-exportation of Colonial produce unfettered in any respect other than by the condition of its having been landed and paid the ordinary duties, and finally who communicated to this Government thro' Mr. Merry, the instructions given to the British Commanders and Courts in the West Indies, in which blockades, and the mode of giving notice of them were defined in terms liable to no objection. His concurrence therefore in an admissible provision, on these cardinal points, is due to that consistency which all men value more or less; and to which you will of course appeal, as far as circumstances may invite and delicacy permit. The inducement to touch that string is the greater as it has not appeared that in any of the late Parliamentary discussions, this nobleman has joined in the unfriendly language held in relation to the neutral and commercial rights of this Country. It is to be recollected also that Lord Sidmouth, was at the Head of the administration at the period alluded to, and consequently ought to be induced by a like regard for his character to promote the adjustment we claim, in case he should be excepted, as is said to be not improbable, out of the dismission of his colleagues.

There are considerations moreover which cannot be without weight with a prudent Cabinet, however composed. They must know that apart from the obstacles which may be

opposed here to the use of British manufactures, the United States, by a mere reciprocation of the British navigation and Colonial laws, may give a very serious blow to a favorite system, a blow that would be felt perhaps as much too in its example, as in its immediate operation. Should this policy be adopted by the United States, as it respects the British West Indies, the value of those possessions would be either speedily lost, or be no otherwise than by a compliance with the fair reciprocity claimed by this Country. It can no longer be unknown to the most sanguine partizan of the Colonial Monopoly, that the necessaries of life and of cultivation, can be furnished to those Islands from no other source than the United States; that immediate ruin would ensue if this source were shut up; and that a gradual one would be the effect of even turning the supplies out of the present direct channel, into a circuitous one thro' neutral ports in the West Indies. In this latter alternative, the least unfavorable that presents, the produce of this Country would be carried to, probably a Danish Island with the same mercantile profit, and the same employment of our navigation, as if carried to the British Island consuming it; and would thence be transported to the British Island with little advantage to British Ships, which would necessarily be sent in ballast, and confined to a sickly climate; whilst the enhanced price of the supplies would be fatal first to the prosperity and finally to the existence of those dependencies.

It ought to occur moreover to the British Government that its marine may become as dependant as its Colonies on the supplies of the United States. As an auxiliary resource for naval stores, this Country must be at all times important to Great Britain. But it will be the sole and therefore an essential one in case that of the Baltic and even of the black sea, should fail. And it may be justly remarked that a prohibition of this branch of our exports would be a less sacrifice than that of any other important one; inasmuch as some of the Articles of which it consists, being necessary to

ourselves, and of an exhaustible nature, make it a problem whether the regulation would not in itself accord with our permanent interests.

Lastly it should not be forgotten that the United States are one of the Granaries which supply the annual deficit of the British harvests. The northern part of Europe, the usual concurrent resource is in a situation that must disable it, for some time, whatever the course of events may be, to spare any of its stock of food; nor can any substitute, other than the redundant harvests of the United States, be relied on to make up that deficiency. Add to this prospect, the possibility of an unfavorable season requiring enlarged importations of bread from the only source that can furnish it, and the risk of losing this would be an evil which no provident Counsels would neglect to guard against, by any measures equitable in themselves, or even by concessions neither dishonorable nor materially injurious.

On the other hand Great Britain having been led by her peculiar system to carry her commercial exclusions and restrictions to the utmost limit permitted by her immediate wants, would find no countervailing resources to be turned against the United States. She could not prohibit the importation of our productions: These are necessaries which feed her people, which supply her manufactories, which keep up her navy, and which, by direct and indirect contributions to her revenue and credit strengthen all her faculties as a great power. As little could she prohibit the exportation of her manufactures to the United States: This is the last evil she would think of inflicting on herself. If it withheld from us the means of enjoyment, it would take from her own people the means of existence.

Would War be a better resort? That it would be a calamity to the United States is so well understood by them that peace has been cherished in the midst of provocations which scarcely permitted honor to listen to interest, to reason or to humanity. War they will continue to avert by every policy

which can be reconciled with the essential duties which a nation owes to itself. But what will be the gain and the loss to Great Britain by a choice of this resort? The spoils of our defenceless commerce might enrich her greedy cruizers and flatter the sentiments of national wealth. A temporary spasm might, at the same time, be produced in the affairs of the United States. But these effects weigh little against the Considerations which belong to the opposite scale. To say nothing of the hostile use that might be made against Great Britain of 50,000 seamen, not less hardy or enterprising than her own, nor of her vulnerable possessions in our neighbourhood, which tho' little desired by the United States, are highly prized by her, nor of the general tendency of adding the United States to the mass of nations already in arms against her; it is enough to observe, that a war with the United States involves a complete loss of the principal remaining market for her manufactures, and of the principal, perhaps the sole, remaining source of supplies without which all her faculties must wither. Nor is it an unimportant circumstance, tho' it seems to have engaged little of her attention, that in the loss would be included, all the advantages which she now derives from the neutrality of our flag, and of our ports, and for which she could find no substitutes in distributing her manufactures, and even her fish to their necessary markets, and in obtaining the returns which she wants. The more these collateral advantages are enquired into, the more important will the interest appear which Great Britain has in preserving them.

These are views of the subject, which, tho' not to be presented to Great Britain with an air of menace or defiance, equally forbidden by respect to ourselves, and to her, may find a proper way to her attention. They merit hers as well as ours; and if they ought to promote on both sides, a spirit of accommodation, they shew at the same time that Great Britain is not the party which has the least interest in taking Counsel from them.

I have the honor to be, Gentlemen, &c.

TO JOHN ARMSTRONG.

D. OF S. MSS. INSTR.

DEPARTMENT OF STATE, May 22d, 1807.

SIR,

The two last letters received from you were of Dec. 24 and Jany. 16.

The decree of Nov. 21st communicated in the first had previously reached us, and had excited apprehensions which were repressed only by the inarticulate import of its Articles, and the presumption that it would be executed in a sense not inconsistent with the respect due the Treaty between France and the United States. The explanations given you by the Minister of Marine, were seen by the President with much pleasure, and it only remains to learn that they have been confirmed by the express authority of the Emperor. We are the more anxious for this information as it will fortify the remonstrances which have been presented at London against the British order of Jany. 7. Should it, contrary to expectation, turn out that the French decree was meant, and is to operate according to the latitude of its terms, you will of course have made the proper representations, grounded as well on the principles of public law, as on the express stipulations of the Convention of 1800. Nothing, besides, could be more preposterous than to blend with an appeal to neutral rights and neutral Nations, a gross infraction of the former, and outrage on the sentiments of the latter; unless it be to invite a species of contest on the high seas, in which the adversary has every possible advantage. But on the more probable supposition that the decree will not be unfavorably expounded, it will be still necessary to press on the French Government a dispatch of such orders to their Cruizers in every quarter, as will prevent a construction of the decree favorable to their licencious cupidity. The moment your letter was received, the answer of the French Minister of Marine to your note, was communicated to Genl. Turreau,

with a call on him to transmit it immediately to the French Governors in the West Indies. This he readily engaged to do. But notwithstanding this precaution, there are proofs that the West India Privateers have, under colour of the Edict, committed depredations which will constitute just claims of redress from their Government.

Mr. Erving has forwarded a Spanish decree also avowedly pursuing the example, and the views of the French Emperor. The terms of this decree are even more vague, or rather more broad than those of the prototype; and if not speedily recalled or corrected, will doubtless extend the scene of spoliations already begun in that quarter; and of course thicken the cloud that hangs over the amity of the two Nations.

Your other letter (of Jany. 16) intimates a hope that the return of the French Court to Paris, would soon afford an opportunity of renewing your communications with the Minister of Foreign Relations. The course of events appear to have prevented this opportunity, and to have prolonged the suspense in which our affairs have been kept, unless, indeed, other channels and modes should have been found for bringing them to an issue. The delays, and the pretexts for them, have put the patience of the United States to a severe trial. It ought not to be supposed by Spain, or her ally, that a crisis can be much longer procrastinated. The impending collision on the Western side of the Mississippi has indeed been obviated; but the adjustment suspends only the danger which threatened the peace in that quarter; whilst, on the Eastern side of the Mississippi, the obstinacy of the Spanish authorities in vexing and obstructing the use of the Mobille by our Citizens living on its Waters, and having no other channel of communication with the sea, is kindling a flame which has been with difficulty kept under, and must in a short time acquire a force not to be resisted. This state of things without adverting to other topics, demands the instant and most serious attention of all who are friendly to peace between Spain and the United States. It cannot,

and ought not to be disguised, that the time is approaching when the latter may have no other choice, than between a foreign and an internal conflict.

The Treaty signed at London in Dec last not having obtained the objects of the United States, and being moreover otherwise objectionable in some of its Articles, has not received the approbation of the President, nor been submitted to the consideration of the Senate. The Wasp sloop of War which conveys this to a French port, carries back to England Mr. Purviance, with instructions for our Commissioners to attempt a remodification of the instrument; and, particularly, to insist on a remedy for the case of British impressments from American vessels on the high seas, which forms no Article in the instrument signed on the 31st Decr, and without which no Treaty will be concluded.

I enclose a printed statement of what passed on the examination of Col. Burr before the Chief Justice. His trial commences this day. A profusion of affidavits had charged him with a complication of crimes, and a number of witnesses will attend to support the charges. The great distance of others will prevent their attendance, unless the trial should be adjourned. The pains which have been taken to investigate, suppress, and punish the hostile enterprize, understood to be principally aimed against the Spanish possessions, present a conspicuous contrast to the perfidious conduct of Spain through a series of years towards the United States. The occurrence demands the attention of Spain as a proof also, that she owes the safety of her possessions, to the controul of the very Government which she has been so scandalously endeavouring to dismember and overturn.

There is strong ground for believing that Yrujo plotted with Burr on the idea that a dismemberment of the Union was the object. The silence and manner of Turreau leave no doubt that he did not regard Mexico as the object. Merry was in the secret of the plot as directed against the Spanish possessions, and relished it; but without committing his Government.

It merits your attention to ascertain the Agents and intrigues of Burr at Paris.

I send you herewith a series of newspapers, and a statistical publication giving some interesting views of this Country.

May 24.—I have just received your letter of Feby. 15 continued March 20: Both of them are silent as to the decree of Novr. 21 from which I infer that it does not operate against our Commercial rights. I regret that even at the latter date, you were unable to make any favorable communications with respect to our affairs with Spain.

I have the honor to be, &c.

## TO JAMES MONROE.

D. OF S. MSS. INSTR.

DEPARTMENT OF STATE, May 22d, 1807.

SIR;

In my letter of March 18th to the joint Commissioners, it was signified that in a Conventional arrangement on the subject of Boundaries, it would be inconsistent with the views of the President, to open any part of Louisiana, to a British trade with the Indians. From the evident solicitude of the British Government on this point, it is highly probable that the determination of the President will be a bar to any adjustment of that part of the differences between the two Countries; nor is it very probable, considering the jealousy and want of information on the British side, that independently of that obstacle the adjustment would at this time be concluded. That you may not however be without any information which might contribute to its accuracy, or put you on your guard against propositions militating against any of our just pretensions, I transmit herewith copies of a communication from the Governor of New York, and of another from the Governor of Vermont. With respect to the last it may be sufficient merely to save the right of correcting the alleged error at a future day. With respect to the subject

of the former, it may be proper either to leave that also open to future discussion, or rather to provide for a joint examination and report relative to the Islands and channels in the St. Laurence, &c. The most obvious and convenient demarkation would seem to be the channel best fitted for navigation. But as a more equal division of the Islands might possibly be made without losing sight of a sufficient channel for common use, and as military positions may be involved in the case, it may be most safe and satisfactory to both parties, to proceed on more thorough and impartial information than is now possessed by either. I address these communications to our Ordinary Minister at London, merely because the subject has not been formally transferred to the joint Commissioners. They will of course be for the use of the latter, if this branch of the negotiations should remain in their hands.

I have already had frequent occasion to transmit accounts of British outrages in the American seas, and particularly on our coasts and within our harbours. I am now under the necessity of communicating a recent insult from the Commanding officer of the Driver sloop of War, lying at the time, in violation of law, in the harbour of Charleston, which is too gross to be otherwise explained than by the letter containing it, the original of which is herewith inclosed, and will be legal proof of the offence.

You will lay the case before the British Government without comment, because that cannot be necessary, and without any special requisition, because a silent appeal to its own sensibility, ought to be the most effectual, as it will be the most respectful course for obtaining the satisfaction due to the United States. It will remain to be seen in this case, as in that of Capt. Whitby, how far it is the disposition of the British Government to reform, by proper examples, the outrages and arrogance which their naval Commanders have too long practised with impunity.

In addition to this enormity of the Capt. of the Driver,

it is proper to inclose an instance of another stamp, which involves the Court of Vice Admiralty at Bermuda, as well as Capt. Berresford who commands the Cambrian, another of the interdicted ships. You will find by the inclosed letter from Mr. at Bermuda that a dispatch from the Charge des Affaires of the United States at Madrid, found on board an American vessel, sent by Berresford for trial at Bermuda, was, after having the seals broken, and of course been read, thrown into the Registrars office, left there for several Months, and finally *permitted* only to be forwarded to its address; the letter continuing throughout without being even sealed. To place this disgraceful proceeding in its just light, it is to be noted that the dispatch was under the official seal, and endorsed in the hand writing, and with the name of Mr. Erving, as from the Legation of the United States at Madrid; and that an inclosed letter from him to me, endorsed in his hand *private*, was treated in the same manner. This occurrence, and it is far from being the only one of the sort, will afford another test of the degree of respect entertained by that Government, as well for its own honor, as for the most sacred of all rightly belonging to others.

As a further evidence of the aggressions and provocations experienced by our National rights from the Licenciousness of British Officers and Agents, I inclose a statement from our late Commercial Agent at Curracoa, of the proceedings at that Island at, and subsequent to its capture by the British arms. I inclose also copies of Affidavits of a Pilot and of the Master of the Brig Mercury, relating to the Conduct of the Frigate Melampus. These wrongs contribute to swell the just claims of indemnity, of which the amount is in other respects so considerable.

In my letter of I explained the violation of our territory by the British ships of war which destroyed the French 74 near the shore of North Carolina, and inclosed the copy of a letter from the French Plenipotentiary here on that subject. In another of late date he redoubles his

remonstrances, and presses in the strongest manner, the reparation due to his Government for the wrong done to it.

That the British Government understands and feels what is due from others to her own territorial jurisdiction is sufficiently manifested by the Complaint lately delivered by its Minister here in consequence of special instructions against an irregularity committed in the harbour of Malta, by the Commander of a public vessel of the United States. An explanation of the incident, with the Note of Mr. Erskine will be found in the documents which make a part of the present inclosures. Mr. Erskine was immediately told that the United States were as ready to do as to demand justice; that in the case stated the punishment of a British subject, by a foreign Officer, within British jurisdiction, instead of a resort to the local Magistracy, was an assumption of power not to be justified, however it might be mitigated by the frequency of examples given by British Commanders; and that the respect of the United States for the principle which had been violated would be proved by the measures which would be pursued. The President being now returned to the Seat of Government, a more formal answer to the same effect, will be given as soon as the pressing and weighty business on hand will permit.

The coincidence of this incident with the remonstrances proceeding from the United States may be made to bear advantageously on the reasonableness and necessity of regulations which will put an end to all such occasions of irritation and ill will between the two Countries. It cannot be too strongly repeated that without some effectual provision against the wanton spoliations and insults committed by British Cruizers on our Coasts and even within our harbours, no other arrangements whatever can have the desired effect, of maintaining and confirming the harmony of the two Nations. And it deserves the serious consideration of the British Government whether any provision will be effectual which does not suppress the practice of British Cruizers in watching and waylaying our commerce in the vicinity of our ports. The British Nation

prides itself on a respect for the authority of the law of Nations. Let it then consult the rules laid down on this point by all jurists who treat of it. Let the learned and respectable Azuni be consulted, or even Vattell so often appealed to in support of British principles. Great Britain professes a particular regard to system and consistency in all her political and legal principles, let her then trace in her own principles and claims, when she was a neutral nation, the illegality of the proceedings of which we complain. Certain it is that if these proceedings continue to find no adequate remedy elsewhere, they must present a dilemma here which may compel the United States to seek one either in the extension of measures already exemplified, or in such others as may be deemed more efficacious.

You will have received a statement of the case of Yrujo of which two copies have been inclosed to you. He has not yet been subjected to any further consequence of his misbehaviour, than a degradation from the exercise of his functions. The suspicions are very strong that he intrigued and co-operated with the projects of Burr as being levelled against the Unity of the Empire. The intercepted letters from him to his Court, which were communicated by the British Ministers, tho' as you observe less important than had been presumed, convict him of the libellous and mischievous spirit of his communications. You will take occasion to express to the British Government the sense entertained by the President of the cordial manner in which it furnished the contents of those letters.

Col. Burr's trial commences at Richmond to day. There is a profusion of affidavits charging him with a complication of crimes. What the force of the Oral testimony, or the event of the Trial, may be, cannot be foretold. Much of the strongest testimony will necessarily be absent, unless a postponement should take place. I send you a printed copy of what passed on his examination before the Chief Justice.

I send you also, a series of news-papers, with a late

statistical publication containing some interesting views of our National faculties and resources.

I have the honor to be, &c.

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TO JAMES MONROE.

D. OF S. MSS. INSTR.

DEPARTMENT OF STATE, July 6th, 1807.

SIR,

The documents herewith inclosed from No. 1 to No. 9 inclusive, explain the hostile attack, with the insulting pretext for it, lately committed near the Capes of Virginia, by the British ship of War the Leopard, on the American frigate the Chesapeake. No. 10 is a copy of the Proclamation issued by the President, interdicting, in consequence of that outrage, the use of our waters and every other accommodation, to all British Armed ships.

1st. *This enormity is not a subject for discussion.*[1] The immunity of a national ship of War from every species and purpose of search on the high seas, has never been contested by any nation. Great Britain would be second to none, in resenting such a violation of her rights, and such an insult to her flag. She may bring the case to the test of her own feelings, by supposing that, instead of the customary demand of our marines serving compulsively even, on board her ships of war, opportunities had been seized for rescuing them, in like manner, whenever the superiority of force, or the chance of surprize, might be possessed by our ships of War.

But the present case is marked by circumstances which give it a peculiar die. The seamen taken from the Chesapeake had been ascertained to be native Citizens of the United States; and this fact was made known to the bearer of the demand, and doubtless communicated by him to his commander, previous to the commencement of the attack. It is a fact also, affirmed by two of the men, with every

[1] Italics for cypher.

appearance of truth, that they had been impressed from American vessels into the British frigate from which they escaped, and by the third, that having been impressed from a British merchant ship, he had accepted the recruiting bounty under that duress, and with a view to alleviate his situation, till he could escape to his own country: and that the attack was made during a period of negotiation, and in the midst of friendly assurances from the British Government.

The printed papers, herewith sent, will enable you to judge of the spirit which has been roused by the occasion. It pervades the whole community, is abolishing the distinctions of party; and, regarding only the indignity offered to the Sovereignty and flag of the Nation, and the blood of Citizens so wantonly and wickedly shed, demands, in the loudest tone, an honorable reparation.

With this demand you are charged by the President. The tenor of his proclamation will be your guide, in reminding the British Government of the uniform proofs given by the United States of their disposition to maintain, faithfully, every friendly relation; of the multiplied infractions of their rights by British Naval Commanders on our coasts and in our harbours; of the inefficacy of reiterated appeals to the justice and friendship of that Government; and of the moderation on the part of the United States, which reiterated disappointments had not extinguished; till at length no alternative is left, but a voluntary satisfaction on the part of Great Britain, or a resort to means depending on the United States alone.

The nature and extent of the satisfaction ought to be suggested to the British Government, not less by a sense of its own honor, than by justice to that of the United States.

[1] *A formal disavowal of the deed, and restoration of the four seamen to the ship from which they were taken*, are things of course *and indispensable. As a security for the future, an entire abolition of impressments from vessels under the flag*

[1] Italics for cypher.

*of the United States*, if not already arranged, *is also to make an indispensable part of the satisfaction. The abolition* must be on terms compatible with the instructions to yourself and Mr. Pinkney on this subject; and if possible *without the authorized rejection from the service of the United States of British seamen who have not been two years in it.* Should it be impossible to *avoid this concession on the part of the United States*, it ought of itself, as being more than a reasonable *price for future security*, to extend the reparation due for the past.

But, beyond *these indispensable conditions the United States have a right to expect* every solemnity *of form* and every other ingredient of retribution and respect, which, according to usage and the sentiments of mankind, are proper in the strongest cases of insult, to the rights and sovereignty of a nation. And the British Government is to be apprized of the importance of a full compliance with this expectation, to the thorough healing of the wound which has been made in the feelings of the American Nation.

Should it be alleged as a ground for declining or diminishing the satisfaction in this case, that the United States have themselves taken it, by the interdict contained in the proclamation, the answer will be obvious. The interdict is a measure not of reparation, but of precaution; and would besides be amply justified by occurrences prior to the extraordinary outrage in question.

The exclusion of all armed ships whatever from our waters is, in fact, so much required by the vexations and dangers to our peace experienced from their visits, that the President makes it a special part of the charge to you, to avoid laying the United States under any species of restraint from adopting that remedy. Being extended to all belligerent nations, none of them could of right complain; and with the less reason, as the policy of most nations has limited the admission of foreign ships of war, into their ports, to such number as, being inferior to the naval force of the Country, could be readily made to respect its authority and laws.

As it may be useful in enforcing the justice of the present demands, to bring into view applicable cases, especially where Great Britain has been the complaining party, I refer you to the ground taken, and the language held by her, in those of the Faulkland Islands, and Nootka Sound; notwithstanding the assertion by Spain, in both cases, that the real right was in her, and the possession only in Great Britain. These cases will be found in the Annual Registers for 1771 and 79, and in the parliamentary debates for those years. In the latter you will find also two cases referred to, in one of which the French King sent an Ambassador Extraordinary to the King of Sardinia, in the most public and solemn manner, with an apology for an infringement of his territorial rights in the pursuit of a smuggler and murderer. In the other case, an Ambassador Exty was sent by the British Government to the Court of Portugal, with an apology for the pursuit and destruction by Admiral Boscawen, of certain French ships on the coasts of this last Kingdom. Many other cases more or less analogous may doubtless be found, see particularly the reparation by France to Great Britain for the attack on Turks Island in 1764, as related in the Annual Register and in Smollets continuation of Hume vol. 10; the proceedings in the case of an English merchantman, which suffered much in her crew and otherwise from the fire of certain Spanish Zebecs cruizing in the Mediterranean, and the execution of the Lieutenant of a privateer for firing a gun into a venetian Merchantman, which killed the Capt. as stated in the Annual Register for 1781 page 94. The case of an affront to a Russian Ambassador in the Reign of Queen Ann, tho' less analogous shews, in a general view, the solemnity with which reparation is made for insults having immediate relation to the Sovereignty of a nation.

Altho' the principle which was outraged in the proceedings against the American Frigate, is independent of the question concerning the allegiance of the seamen taken from her, the fact that they were citizens of the United States, and

not British subjects may have such an influence on the feelings of all, and perhaps on the feelings of some unacquainted with the laws and usages of nations, that it has been thought proper to seek more regular proofs of their National character than were deemed sufficient in the first instance. These proofs will be added by this conveyance, if obtained in time for it; if not, by the first that succeeds.

The President has an evident right to expect from the British Government, not only an ample reparation to the United States in this case, but that it will be decided without difficulty or delay.[1] *Should this expectation fail*, and above *all, should reparation be refused, it will be incumbent on you to take the proper measures for hastening home, according to the degree of urgency, all American vessels remaining in British ports; using for the purpose the mode least likely to awaken the attention of the British Government. Where there may be no ground to distrust the prudence or fidelity of Consuls, they will probably be found the fittest vehicles for your intimations.* It will be particularly *requisite to communicate to our public ships in the Mediterranean the state of appearances, if it be such as ought to influence their movements.*

*All negotiation with the British Government on other subjects will of course be suspended until satisfaction on this be so pledged and arranged as to render negotiation honorable.*

Whatever may be the *result or the prospect*, you will please to *forward to us the earliest information.*

The scope of the proclamation will signify to you, that the President has yielded to the presumption, that the hostile act of the British Commander did not pursue the intentions of his Government. It is not indeed easy to suppose, that so rash and critical a step, should have originated with the admiral; but it is still more difficult to believe, that such orders were prescribed by any Government, under circumstances, such as existed between Great Britain and the United States.

Calculations founded on dates, are also strongly opposed

[1] Italics for cypher.

to the supposition, that the orders in question could have been transmitted from England. In the same scale are to be put the apparent and declared persuasion of the British representative Mr. Erskine, that no orders of a hostile spirit could have been issued or authorized by his Government, and the coincidence of this assurance with the amicable professions of Mr. Canning, the organ of the new administration, as stated in the dispatch of the 22d April from yourself and Mr. Pinkney.

Proceeding on these considerations, the President has inferred, that the justice and honor of the British Government will readily make the atonement required; and in that expectation, he has forborne an immediate call of Congress, notwithstanding the strong wish which has been manifested by many, that measures depending on their authority, should without delay be adopted. *The motives to this forbearance have, at the same time, been strengthened by the policy of avoiding a course, which might stimulate the British cruizers in this quarter to arrest our ships and seamen now arriving* and shortly expected *in great numbers, from all quarters.* It is probable, however, that *the Legislature will be convened in time to receive the answer of the British Government on the subject of this dispatch; or even* sooner *if the conduct of the British squadron here, or other occurrences, should require immediate measures beyond the authority of the Executive.*

You are not unaware of the good will and respect for the United States, and personally even for the President, which have been manifested *by the Emperor of Russia*, nor of the inducements to cultivate *the friendship of so great a power*, entertaining principles *and having interests, according* in some important views, *with those of the United States.* This consideration combined with the *subsisting relations between Russia and Great Britain*, make it proper in the opinion of the President, that *in case of an express or probable refusal of the satisfaction demanded of the British Government, you should take an early occasion*, if there be no

special objections unknown here, *of communicating to the Russian Minister at London, the hostile insult* which has been offered, as well as the *resort which may become necessary on our part, to measures* constituting *or leading to war*, and of making *him sensible of the regret which will be felt, at a rupture with a power, to which the Emperor is allied by so many close and important interests.*

In order to give you the more expedition and security to the present dispatch, a public armed vessel, the Revenge, is especially employed, and Dr. Bullus is made the bearer, who was on board the Chesapeake on his way to a Consulate in the Mediterranean, and will be able to detail and explain circumstances, which may possibly become interesting *in the course of your communications with the British Government.*

The vessel after depositing Dr. Bullus at a British port will proceed *with dispatches to a French port*, but will return to England with a view to bring the result of your transactions with the British Government. *The trip to France will afford you* and *Mr. Pinkney a favorable opportunity for communicating with our ministers at Paris, who* being *instructed to regulate their conduct on the present occasion, by the advices they may receive from you will need every explanation that can throw light on the probable turn and issue of things with Great Britain.*

I have, &c.

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## TO JOHN ARMSTRONG AND JAMES BOWDOIN.

D. OF S. MSS. INSTR.

DEPARTMENT OF STATE, July 15th, 1807.

GENTLEMEN,

The inclosed copy of a proclamation by the President will inform you of a late extraordinary hostility and insult committed by a British ship of War on a frigate of the United States near the Capes of Virginia, and of the measures taken by the President in consequence of the outrage. The subsequent proceedings of the British Squadron

in our waters, have borne a like stamp of hostility; and altho' it may be found that these provocations have not issued from or may be disavowed and expiated by the British Government it may also be found that the United States must take on themselves the reparation that is due to them. For this event it is necessary to be prepared; as well with a view to our finances, as to other resources and arrangements.

In this state of things, the President, taking into consideration the objections to an application of the public funds to objects not immediately connected with the public safety, instructs you to suspend the negotiation for the purchase of the Floridas, unless it shall be agreed by Spain that payment for them, shall in case of a rupture between Great Britain and the U. States, be postponed till the end of one year after they shall have settled their differences; and that in the mean time no interest shall be paid on the debt. You will of course understand it to be inconsistent with this instruction either to draw on the Treasury, or to obtain a credit in Europe, for any part of the sum allotted for the purchase of the Floridas.

Should a bargain have been made for the Floridas and payments stipulated, as contemplated by former instructions, you will press in the most serious and emphatic manner, a remodification of the terms which will adjust them to the instruction here given. Such a compliance may justly be expected in return for the advantages which Spain and her allies will derive, in various respects from a contest between this country and their enemy. It may further be expected that, in consideration of these advantages to them, and of the general effect of a War, or even a cessation of commerce with Great Britain on the pecuniary faculties of the United States, the price demanded for the Floridas, will be at least greatly reduced. To this consideration, it may be added, that whilst the pecuniary faculties of the United States will be so materially benumbed in the event of a rupture with Great Britain, those of Spain may be essentially aided, by the facility which

that event will give to the command of her South American Treasure through the United States. Finally it is not unworthy of consideration, that the introduction of hostile relations between the United States and Great Britain, may remove objections hitherto felt by the latter, to enterprizes against the Floridas, and lead to a military occupancy of them with views very adverse to the policy of Spain.

Should Spain still obstinately persist in rejecting or retarding an arrangement concerning the Floridas, she must at least see the necessity of hastening a satisfactory one on other subjects, particularly in the case of the Mobille for the free use of which by the United States, orders ought to be sent without a moments delay.

The President leaves to your own discretion the use to be made of observations of this kind, and entertains an entire confidence, that your management of the whole business will be such as will best comport with the circumstances of the crisis, and conduce most to the object entrusted to you.

This dispatch goes by the Revenge, a public armed vessel charged with instructions to our Ministers in London, to require from the British Government the satisfaction due for the insult to the U. States. She will touch at a French port from which one of her officers will proceed to Paris. She will also return from England to France, and convey to you from Mr. Monroe and Mr. Pinkney, the communications rendered proper by the conduct and countenance of the British Government in relation to the United States. The influence which those communications ought to have on your proceedings, will depend on the tenor of them, and must be left to your own discernment and sound judgment.

I have the pleasure to assure you that the spirit excited throughout our nation, by the gross attack on its sovereignty, is that of the most ardent and determined patriotism. You will find sufficient specimens of it in the papers herewith inclosed.

I have the honor to be &c.

TO JAMES MONROE.

D. OF S. MSS. INSTR.

DEPARTMENT OF STATE, July 17, 1807.

SIR,

Since the event which led to the Proclamation of the 2 inst, the British squadron has conducted itself in a continued spirit of insolence and hostility. Merchant vessels arriving and departing have been challenged, fired at, examined and detained within our jurisdiction, with as little scruple as if they were at open sea. Even a Revenue Cutter conveying the Vice President and his sick daughter from Washington to New York and wearing her distinctive and well known colours did not escape insult. Not satisfied with these outrages, the British Commodore Douglass advanced into Hampton Roads with his whole squadron consisting of two 74's one ship of 50 guns and a frigate; threatened by his soundings and other indications, a hostile approach to Norfolk; and actually blockaded the town by forcibly obstructing all water communication with it. In a word, the course of proceeding amounted as much to an invasion and a siege as if an Army had embarked and invested it on the land side. It is now said that the whole squadron has left Hampton roads, in consequence of a formal notice of the Presidents proclamation; and has fallen down to their former position at a small distance from the Capes; awaiting probably the further orders of the commanding Admiral at Halifax.

These enormities superadded to all that have gone before, particularly in the case of Bradley, Whitby, Love, the destruction of the French Ship on the sea board of North Carolina, the refusals of Douglass whilst within our waters to give up American seamen not denied to be such; to say nothing of British violences against our vessels in foreign ports, as in Lisbon and Canton, form a mass of injuries and provocations which have justly excited the indignant feelings of the nation and severely tried the patience of the Government. On the present occasion, it will be proper to bring

these collective outrages into view; and to give them all the force they ought to have not only in augmenting retribution for the past, but in producing securities for the future. Among these the enlargement of our Marginal jurisdiction, and the prohibition of cruizers to hover about our harbours and waylay our trade, merit every exertion that can properly be made, and if not obtained, will place in a stronger view, the necessity of leaving unfettered the right of the United States to exclude all foreign armed ships from our ports and waters. In the adjustment between Great Britain and Spain, of the Affair of Nootka Sound, there is an Article which acknowledges and stipulates to the latter a margin of ten leagues. Every consideration which could suggest such a latitude in favor of the Spanish Territory equally at least supports the claim of the United States. In addition to the remarks heretofore made on the subject of infesting our commerce near the mouths of our harbours, I beg leave to refer to what is contained in Azuni in relation to it.

I have the honor to be, &c.

## TO JAMES BOWDOIN.

D. OF S. MSS. INSTR.

DEPARTMENT OF STATE, July 17th, 1807.

SIR,

Since the event which led to the late Proclamation of the President, inclosed in the letter to Genl. Armstrong and yourself, the British squadron in the Waters of Virginia, has conducted itself in the same insolent and hostile spirit. Merchant vessels arriving and departing have been challenged, fired at, examined and detained, within our jurisdiction, with as little scruple as if they were at open sea. Not satisfied with these outrages, the British Commodore Douglass advanced into Hampton Roads with his whole squadron, consisting of two 74's, a ship of 50 guns, and a frigate; threatened by his soundings and other preparations an hostile approach

to Norfolk; and actually blockaded the Town by forcibly obstructing all water communication with it. In a word, the course of proceeding has amounted as much to an invasion and a siege, as if an Army had debarked and invested the town on the land side. It is now said that the whole squadron has left Hampton Roads, in consequence of a formal notice of the President's proclamation, and fallen down to their former position at a small distance within the Capes, probably awaiting the further orders of the Commanding Admiral at Halifax.

The spirit and exertions called forth by the Crisis, have been truly gratifying. Volunteers turned out by thousands. The situations most exposed to predatory debarkations were guarded; and Norfolk was soon made safe by a judicious disposition of the Chesapeake, refitted for the occasion, a French frigate which happened to be in the harbour, and a few gun Boats, and by availing the whole of the support of the fortifications in the vicinity.

The Grand Jury, during the late Session of the Circuit Court at Richmond, found Bills of Treason and Misdemeanor against Aaron Burr, Jonathan Dayton, John Smith (Senator from Ohio) Blannerhasset and several others. Their trials will take place on the 3d of next month.

I have the honor to inclose a private letter from the President, which renders it unnecessary for me to say more in reference to the considerations which personally interest you, than that he acquiesces in your proposed return to the United States, but with a wish to avail the public of your services at Madrid if not disagreeable to you, and if there be no objection to this arrangement, presented by circumstances in our affairs with Spain, better known to you than to us. The way for the arrangement seems to be fairly opened by the late substitution of the Chevalier de Foronda as Charge d' Affaires, in place of the Marquis d' Yrujo, and by the understood purpose of transferring hither the present Minister Plenipotentiary of Spain at Milan.

In the present posture of our relations to Great Britain it is prudent to turn them, as much as can be honorably done, to account in our other foreign relations. In the joint letter to you and Genl. Armstrong, this policy has been explained as it applied to the objects embraced by the joint Commission. But there are other cases in which Spain is counselled by her own interest to promote that of the United States; particularly by giving greater latitude and security to our commerce with her American possessions, above all with the important and Convenient Island of Cuba. I offer this idea for your attention and improvement; and I pray you to communicate it to Mr. Erving, with such of the other matters contained in the dispatches now forwarded, as it may be useful for him to possess.

I have the honor to be &c.

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TO JAMES MONROE.

D. OF S. MSS. INSTR.

DEPARTMENT OF STATE, October 21, 1807.

SIR,

I inclose for your information copies of the letters which have passed on several subjects between Mr. Erskine and the Department of State; and which it may be useful for you to possess. The proceedings at Halifax with respect to one of the men taken from the Chesapeake, and whose restoration was included in the demand of reparation for that outrage, are calculated to inspire great distrust of the temper and intentions of the British Government towards this Country. Is it conceivable that at so late a day Berkley could be unapprized of the light in which his original offence was viewed by his superiors, or that if apprized of their displeasure at it, he would brave the consequences of an additional temerity of so irreparable a character. Before the receipt of this communication you will probably have been enabled to

interpret the phenomenon, and this communication suggests the light in which it is to be presented to the British Government. If the responsibility rests on Berkley or any other Officer, and that Government means to give the satisfaction due to the honor of the United States, there can be no pretext for refusing to make the severest example of the Offender or Offenders. Among the papers accompanying this will be found British evidence that the seaman sentenced to death was not a deserter from a British ship of war as alleged on his trial, but a merchantman only. You will find also that, according to information received here thro' the Collector of Baltimore the Court martial at Halifax, disregarding still further every restraint of law, of decency and of common prudence, proceeded to the trial of the three other men taken from the Chesapeake, without even pretending that they were British subjects, that a partial execution of the sentence on one of them was fatal to his life, and that the two others were forced into the service of a British Ship of War, by making that the alternative of the doom to which they were sentenced. Should this information be confirmed, and it has not yet been impaired by any circumstance whatever, the measure of atrocity will be filled up, and every motive supplied for requiring on our part and for affording on that of Great Britain the full measure of punishment due to it.

The last letter received from Mr. Erskine respecting the detention of a letter to him from Vice Admiral Berkley will not be answered, unless the subject should be resumed after receiving mine which had not reached him at the date of his. If a further answer should be required, it may be necessary to remind him that if the ground for a prosecution were as legal as he supposes, the measure however it might be dictated by the respect which the United States owe to themselves, could not be demanded of right by a Government which has left unpunished the repeated violations committed by its officers on the most solemn dispatches of the United States. Instances of these have from time to time been trans-

mitted to you. In that of the letter from the President to the King of Holland with the great seal internally impressed, the offence was of the most flagrant kind, and rendered the more conspicuous by its publication in the British Newspapers. This circumstance, whilst it necessarily brought the aggravated insult to the notice of the Government might the rather have been expected to be followed by the punishment of the guilty officer, as this course alone could guard the Government itself to which the copy of the President's letter must be presumed to have been sent by the officer who violated it, against appearances and conjectures of the most unfavorable sort.

I have the honor to be &c.

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TO WILLIAM PINKNEY.

D. OF S. MSS. INSTR.

DEPARTMENT OF STATE, Dec. 23, 1807.

Sir,

Mr. Erskine having been so good as to let me know that the Mail of this evening will carry his dispatches for a British packet, which will sail from New York immediately on their arrival there, and other conveyances now failing, I avail myself of the opportunity to inclose you a copy of a message from the President to Congress, and their Act in pursuance of it, laying an immediate embargo on war vessels and exports. The policy and the causes of the measure are explained in the message itself. But it may be proper to authorize you to assure the British Government, as has just been expressed to its Minister here, that the Act is a measure of precaution only called for by the occasion; that it is to be considered as neither hostile in its character, nor as justifying or inviting or leading to hostility with any Nation whatever; and particularly as opposing no obstacle whatever to amicable negotiations and satisfactory adjustments with Great Britain, on the subjects of difference between the two Countries.

Mr. Monroe arrived at Norfolk on the 12th inst, and at this place last night. Mr. Rose has not been heard of, since his reported departure from England on the 9th of Nov.

The suddenness of the present opportunity does not allow me time to add more than a newspaper containing a part of the proceedings of Congress in relation to the Embargo, and assurances of the Esteem & Consideration with which

I remain Sir &c.

END OF VOL. VII.

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